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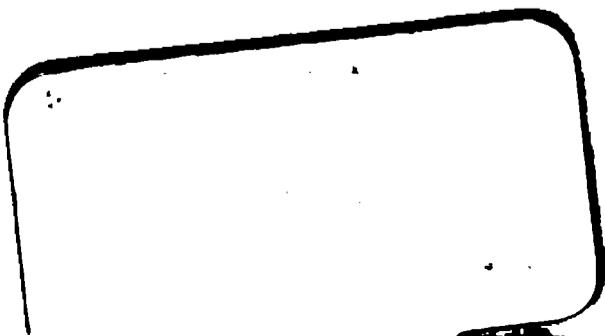
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REPORTS OF CASES

2586
14-28

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA,

DURING THE YEAR 1877.

REPORTED BY

CHAS. F. BICKNELL,

CLERK OF SUPREME COURT,

AND

HON. THOMAS P. HAWLEY,

CHIEF JUSTICE.

VOLUME XII.

SAN FRANCISCO:

A. L. BANCROFT AND COMPANY,

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1878.



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JUSTICES OF THE SUPREME COURT.

HON. THOMAS P. HAWLEY.....CHIEF JUSTICE.
HON. WILLIAM H. BEATTY }
HON. ORVILLE R. LEONARD..... } ASSOCIATE JUSTICES.

OFFICERS OF THE COURT.

HON. JOHN R. KITTRELL.....ATTORNEY-GENERAL.
CHAS. F. BICKNELL.....CLERK.
S. T. SWIFT.....BAILIFF.

DISTRICT JUDGES OF THE STATE OF NEVADA.

1877.

FIRST DISTRICTHON. RICHARD RISING.
SECOND DISTRICT.....HON. S. H. WRIGHT.
THIRD DISTRICT HON. W. M. SEAWELL.
FOURTH DISTRICTHON. W. S. BONNIFIELD.
FIFTH DISTRICTHON. D. C. MCKENNEY.
SIXTH DISTRICTHON. F. W. COLE.
SEVENTH DISTRICT..... HON. HENRY RIVES.
EIGHTH DISTRICTHON. J. S. JAMESON.
NINTH DISTRICT.....HON. J. H. FLACK.

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RULES

OF THE

BOARD OF PARDONS.

1. The regular meetings of the board shall be held on the second Monday of January, April, July, and October of each year.

2. Special meetings may be called by the Governor at any time when the exigencies of any case demand it, notice thereof being given to each member of the board.

3. No application for the remission of a fine or forfeiture, or for a commutation of sentence or pardon, shall be considered by the board unless presented in the form and manner required by the law of the State, "approved February 20, 1875."

4. In every case where the applicant has been confined in the State prison, he or she must procure a written certificate of his or her conduct during such confinement, from the warden of said prison, and file the same with the secretary of this board, on or before the day of hearing.

5. All oral testimony offered upon the hearing of any case must be presented under oath, unless otherwise directed by a majority of the board.

6. Action by the board upon every case shall be in private, unless otherwise ordered by the consent of all the members present.

7. After a case has once been acted upon and the relief asked for has been refused, it shall not, within twelve months thereafter, be again taken up or considered upon

any of the grounds specified in the original application, except by the consent of all the members of the board.

8. In voting upon any application the roll of members shall be called by the secretary of the board, in the following order:

First. The Attorney-General;

Second. The Junior Associate Justice of the Supreme Court;

Third. The Senior Associate Justice;

Fourth. The Chief Justice;

Fifth. The Governor.

Each member, when his name is called, shall declare his vote "for" or "against" the remission of the fine or forfeiture, commutation of sentence, pardon or restoration of citizenship.

RULES
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.

RULE I.

Applicants for license to practice as attorneys and counselors will be examined in open court on the first day of the term.

RULE II.

In all cases where an appeal has been perfected, and the statement settled (if there be one) twenty days before the commencement of a term, the transcript of the record shall be filed on or before the first day of such term.

RULE III.

If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored the dismissal shall be final, and a bar to any other appeal from the same order or judgment.

RULE IV.

On such motion, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of the filing the undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the statement, if there be one; and also, that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record; or, if he has made such request that he has not paid the fees therefor, if the same have been demanded.

RULE V.

All transcripts of records hereafter sent to this court shall be on paper of uniform size, according to a sample to be furnished by the clerk of the court, with a blank margin one and a half inches wide at the top, bottom, and side of each page; and the pleadings, proceedings, and statement shall be chronologically arranged. The pages of the transcript shall be numbered, and shall be written only upon one side of the leaves. Each transcript shall be prefaced with an alphabetical index to its contents, specifying the page of each separate paper, order or proceeding, and of the testimony of each witness, and shall have at least one blank or fly-sheet cover.

Marginal notes of each separate paper, order or proceeding, and of the testimony of each witness, shall be made throughout the transcript.

The transcript shall be fastened together on the left side of the pages by ribbon or tape, so that the same may be secured, and every part conveniently read.

The transcript shall be written in a fair, legible hand, and each paper or order shall be separately inserted.

RULE VI.

No record which fails to conform to these rules shall be received or filed by the clerk of the court.

RULE VII.

For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing, and filed at least one day before the argument, or they will not be regarded. In such cases, the objection must be presented to the court before the argument on its merits.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made and the cause shall proceed as in other cases.

RULE X.

The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; *provided*, that all cases in which the appeal

is perfected, and the statement settled, as provided in Rule II, and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

RULE XI.

Causes shall be placed on the calendar in the order in which the transcripts are filed with the clerk.

RULE XII.

At least three days before the argument, the appellant shall furnish to the respondent a copy of his points and citation of authorities; and within two days thereafter, the respondent shall furnish to the appellant a copy of his points and citation of authorities, and each shall file with the clerk a copy of his own for each of the justices of the court, or may, one day before the argument, file the same with the clerk, who shall make such copies, and may tax his fees for the same in his bill of costs.

RULE XIII.

No more than two counsel on a side will be heard upon the argument, except by special permission of the court; but each defendant who has appeared separately in the court below may be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument.

RULE XIV.

All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

RULE XV.

All motions for a rehearing shall be upon petition in writing, presented within ten days after the final judgment is rendered, or order made by the court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the court below shall be issued until the expiration of the ten days herein

provided, and decision upon the petition, except on special order.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the court below.

RULE XVII.

No paper shall be taken from the court-room or clerk's office except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the clerk.

RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the court, upon petition, showing a proper case for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the clerk of the court below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a *superseas*. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order or decree which is sought to be reviewed, except under special circumstances.

RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, an additional day's notice will be required for each forty miles, or fraction of forty miles, from Carson.

RULE XXIV.

I. The Supreme Court, upon application of the district judge of any judicial district, will appoint a committee to examine persons applying for admission to practice as attorneys and counselors at law. Such committee will consist of the district judge and at least two attorneys resident of the district.

II. The examination by the committee so appointed shall be conducted and certified according to the following rules:

The applicant shall be examined by the district judge and at least two others of the committee, and the questions and answers must be reduced to writing.

No intimation of the questions to be asked must be given to the applicant by any member of the committee previous to the examination.

The examination shall embrace the following subjects:

1. The history of this State and of the United States;
2. The constitutional relations of the State and Federal governments;
3. The jurisdiction of the various courts of this State and of the United States;
4. The various sources of our municipal law;
5. The general principles of the common law relating to property and personal rights and obligations;
6. The general grounds of equity jurisdiction and principles of equity jurisprudence;
7. Rules and principles of pleadings and evidence;
8. Practice under the civil and criminal codes of Nevada;

9. Remedies in hypothetical cases;

10. The course and duration of the applicant's studies.

III. The examiners will not be expected to go very much at large into the details of these subjects, but only sufficiently so, fairly to test the extent of the applicant's knowledge and the accuracy of his understanding of those subjects and books which he has studied.

IV. When the examination is completed and reduced to writing, the examiners will certify and return it to this Court, accompanied by a certificate showing whether or not the applicant is of good moral character and has attained his majority and is a *bona fide* resident of this State.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
JANUARY TERM, 1877.

[No. 744.]

STATE OF NEVADA EX REL. E. TWADDLE v. BOARD
OF COUNTY COMMISSIONERS OF WASHOE
COUNTY.

ROADS AND HIGHWAYS—JURISDICTION OF COUNTY COMMISSIONERS.—Where the board of county commissioners closed a public road upon a petition signed by only fourteen persons, the petition being silent as to the number of legal voters in the county, and the statute requiring the signature of twenty-four freeholders in counties containing one hundred or more legal voters: *Held*, that the action of the board was in excess of its powers and completely null and void.

JUDGMENT IN BAR MUST BE PLEAD.—Where it is claimed that a former judgment is a bar, it must be plead.

CERTIORARI—JUDGMENT OF DISTRICT COURT WHEN NOT A BAR.—In an application made to the district court for a writ of certiorari, petitioner averred that the petition to the commissioners to vacate the highway “had been signed by fourteen freeholders;” and in his application to this court stated that his petition was signed “by no more than fourteen freeholders.” *Held*, that this difference is material, and that the judgment of the district court dismissing the application is no bar to this proceeding.

APPLICATION to the supreme court for a writ of certiorari.
The facts are stated in the opinion.

Argument for Respondent.

Robert M. Clarke, for Relator:

I. The objection that the case was before adjudicated cannot be considered, and the evidence offered to support the objection cannot be received, because there is no plea, and because the evidence offered is insufficient.

II. The refusal of the district court to issue the writ upon a petition substantially, though not exactly, like that filed in this case, cannot bar the right of this court to pass judgment upon the merits, "affirming, or annulling or modifying the proceedings below."

III. The jurisdiction of the respondent to vacate a "public highway" is special and limited, and must affirmatively appear. (*Waitz v. Ormsby County*, 1 Nev. 370; *Swift v. Commissioners of Ormsby County*, 6 Nev. 95; *Hess v. Commissioners of Washoe County*, 6 Nev. 104.)

IV. The proceedings had by the respondents fail to show jurisdiction, either under the act of March 9, 1866 (Stat. 1866, page 252, sec. 6), or the act of March 15, 1875 (Stat. 1875, page 161, sec. 10).

H. B. Cossit, District Attorney of Washoe County, and *W. M. Boardman*, for Respondent:

I. Petitioner having applied to the district court for a writ of certiorari, must seek his remedy by appeal. (1 Comp. L. 1506.)

II. The judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea in bar or evidence, conclusive between the same parties upon the same matter directly in question in another court. (*Gardner v. Buckbee*, 3 Cowen, 120; *Burt v. Sternburgh*, 4 Cowen, 559; 12 Mellville, 399; 2 Barb. 586; *Simpson v. Hart*, 1 John. Ch. 91.)

III. The supreme court will issue the writ of certiorari only in the exercise of its appellate jurisdiction. (Art. 6, sec. 4, of Constitution of Nevada; *People v. Turner*, 1 Cal. 145; *Peacock v. Leonard*, 8 Nev. 250.)

By the Court, BEATTY, J.:

This is an original proceeding upon certiorari instituted for the purpose of obtaining a review of the action of the

Opinion of the Court—Beatty, J.

commissioners of Washoe county in vacating a certain highway.

The petition filed in this court shows that the relator is injuriously affected by the closing of the road, and avers that the order was made upon the petition of only fourteen persons in a county containing more than one hundred legal voters. The return to the writ shows that the petition was signed by only fourteen persons, and is silent as to the number of legal voters in the county. As the jurisdiction of the board to make the order complained of must be affirmatively shown (6 Nev. 95; *Id.* 104; 5 Nev. 317; 9 Nev. 360), it must be presumed that the county of Washoe did contain more than one hundred legal voters, and, consequently, that the petition upon which the board assumed to act was insufficient to authorize their proceedings; for the only law in force at the date when the petition was filed and the order made, required the signatures of twenty-four freeholders, in counties containing one hundred or more legal voters, to any petition to vacate a highway. (Stat. 1866, 252, sec. 5.) That the action of the board was in excess of its powers and completely null and void, admits of no doubt. But the respondents contend that this proceeding is barred in this case by the judgment of the district court of Washoe county in a similar proceeding formerly commenced in that court. The manner in which this point is raised does not entitle it to be considered upon its merits, if it had any. There is no plea of former judgment. But, waiving that objection to its consideration, it is clear that the evidence would not have supported such a plea. It appears that the district court refused to issue the writ, and dismissed the application. Nothing was adjudicated in the district court, so far as appears, except that the petition filed there was insufficient to authorize the issuance of the writ. But the petition filed in this case contains a material averment that was not contained in the petition to the district court. In this case, it is averred that the petition to the board of commissioners to vacate the highway was signed by no more than fourteen freeholders, while in the district court it was only alleged that the petition had been

Points decided.

signed by fourteen freeholders, without the addition of the words "and no more." This difference is material, and consequently the judgment in the proceeding in the district court is no bar to this proceeding, in which the petition is conceded to be sufficient. (47 Cal. 32; 2 Metcalfe, Ky. 544; 1 A. K. Marshall, 237; 24 Ind. 156.)

The order of the board of commissioners of Washoe county, dated March 1, 1875, vacating a certain highway commencing at the Virginia and Truckee railroad, in Washoe valley, and running through lands of E. Owens and Joseph Frey to the upper county road, is declared and adjudged to be null and void, and the relator will have judgment for his costs herein expended.

[No. 766.]

**B. F. RHODES, RESPONDENT, v. J. A. WILLIAMS AND
MARIA WILLIAMS, APPELLANTS.**

SEPARATE APPEAL FROM JUDGMENT.—Where the homestead right of a married woman, who has been made a party defendant with her husband, in an action to dissolve a copartnership—it being claimed that the homestead was purchased with partnership funds—has been finally determined, she can prosecute her separate appeal, although the decree as entered is not final against her husband.

IDEM—WHEN DECREE IS NOT FINAL.—A decree of dissolution of copartnership, which declares that the indebtedness of the partnership can not be determined without making a portion of its creditors parties to the action, and that no final decree can be made until such indebtedness is ascertained and the amount of partnership assets determined by the sale of certain property, is only interlocutory, and an appeal taken therefrom is premature, and must be dismissed.

DISSOLUTION OF COPARTNERSHIP—WHEN WIFE IS A NECESSARY PARTY DEFENDANT.—In an action to dissolve a copartnership where one of the questions involved in the suit is whether the property described in the complaint is the homestead of the defendant, or the property of the partnership, the wife of the defendant is a necessary party to the action.

PARTNERSHIP PROPERTY MAY BE SOLD WITHOUT THE RIGHT OF REDEMPTION.—Where the property of an insolvent partnership is ordered to be sold in order to pay the partnership debts, the right of redemption does not exist.

Argument for Appellant.

SALE OF PARTNERSHIP PROPERTY.—The court, in ordering a sale of partnership property, has the power to prescribe the time and manner of making the sale, and, if the mode prescribed is reasonable and just, it is immaterial whether the order strictly conforms to the provisions of the practice act regulating sales under execution.

REFEREE—FAILURE TO MAKE A REPORT.—If a referee fails to make his report within the time ordered by the court at the time of his appointment, he may be removed upon the application of either party, but if not removed his authority to hear the case does not expire.

HOMESTEAD BUILT WITH PARTNERSHIP FUNDS.—A decree ordering the sale of property claimed by one of the partners as a homestead, will not be set aside where the evidence shows that the partnership is insolvent; that the partner claiming the homestead is largely indebted to it; that partnership funds were used to a considerable extent in building the house claimed as a homestead, and there is some evidence that the land was purchased and improvements made with money derived from that source alone.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

W. L. Knox, for Appellant:

I. The demurrer should have been sustained. The defendant, Maria Williams, was not a member of the copartnership, and not a proper party to a settlement of the business of said copartnership. The complaint fails to show any cause of action against her. (*Summers v. Farish*, 10 Cal. 347.)

II. The complaint states no facts which constitute a fraud on the part of defendant, J. A. Williams.

III. The judgment and decree is erroneous. It orders the homestead of defendants to be sold without redemption, contrary to the provisions of the statutes of 1869 (p. 233, sec. 231.)

IV. It orders that the sale shall be within view of the property, which is contrary to the statutes of 1869 (p. 239, sec. 225.)

V. No process from any court can deprive a wife of her homestead when once acquired. No alienation of such homestead can be made, except by the joint voluntary act of the husband and wife, when that relation exists. (Const., art. IV, sec. 30; stat. 1864–5, pp. 225, 226, 227, sec. 1.)

Argument for Respondent.

VI. The referee had no authority to hear and report a judgment in the cause. His authority had ceased before the hearing. It was a case of special reference, by which he was to hear the parties and report by a certain day. After that day, without an order of court extending the time, he could exercise no functions in the cause.

VII. The judgment and decree entered was final. If plaintiff desired to have the creditors brought in, he should have made them parties to the suit, and had their rights determined at the hearing.

VIII. A partner withdrawing funds of the partnership and applying them to his own use, is accountable for the amount, but that does not constitute a fraud. (Collyer on Part., Perkin's Ed., sec. 178, note 3, p. 166.) As to what constitutes fraud: see Adam's Eq., p. 397, sec. 177. The law might punish fraud of a copartner by depriving him of his homestead, but it has not done so. (*Hawthorne and Wife v. Smith*, 3 Nev. 188.)

Thomas E. Haydon, for Respondent:

I. Defendants' demurrer was properly overruled. (Coll. on Part., sec. 361.)

Plaintiff claims the house and lot as acquired by wrongful use of the partnership funds, and so to be held as partnership property. The defendant, Maria Williams, claimed adversely as individual property of her and her husband, and as being her homestead. Hence she had an adverse claim to the property in controversy, and was a necessary party. (Prac. Act, sec. 13.) The complaint alleges and the proof shows that defendant Williams improperly withdrew and converted the funds of the copartnership of Williams & Rhodes and put it in the house and lot claimed as a homestead, and equity will follow it there. (Story on Part., latter part of sec. 97; Collyer on Part., B. 2, chap. 1, sec. 1; *Cottle v. Leitch*, 35 Cal. 440.)

II. No appeal lies from the order. (Vol. 1, Van Sant. Eq. Prac., 519, 521.) No final decree can be entered until the indebtedness of the partnership is ascertained, and the partnership assets sold and converted into money. (2

Opinion of the Court—Beatty, J.

Van Sant. Eq. Pr., 193 to 207 inclusive; Coll. on Part., sec. 322, note 4.)

III. As no motion was ever made to set aside the order of reference, the authority of the referee continued until his duty was performed. (2 Van Sant. Eq. Pr., 195 to 202.)

By the Court, BEATTY, J.:

The complaint in this action contains, among other things, allegations to the following effect: That for some time prior to the first of December, 1872, plaintiff and the first-named defendant had been equal partners in a grocery and provision store at Reno; that said defendant had had exclusive charge of the principal part of the business of the firm, and particularly of the books and accounts; that he had fraudulently, and without the knowledge or consent of plaintiff, converted to his own use a large portion of the funds of the partnership, and employed them in the purchase of land, and the erection thereon of a dwelling, which he and his wife were claiming as a homestead; that the stock of goods in the store had become greatly reduced; that the defendant was largely indebted to the firm, and the firm largely indebted to the plaintiff and to third parties; that the defendant was totally insolvent; that the plaintiff was responsible and liable for the debts of the firm, the assets of which were insufficient to pay its debts; that the defendant had failed to keep correct accounts of the business and affairs of the partnership; that upon the discovery of these facts plaintiff demanded a dissolution, to which the defendant assented; that the value of the goods remaining on hand was agreed upon, and the whole stock transferred to the plaintiff, defendant being credited on his account with the value of his half; that plaintiff then took exclusive charge of the business, collected the assets, and settled with a portion of the creditors of the firm; that he subsequently demanded an accounting and a settlement with the defendant, which was refused. These allegations are followed by a prayer for an accounting, and that the property claimed by defendants as a homestead may be declared to be partnership property, and ordered to be sold as such, and the funds applied to

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the payment of the partnership liabilities, and for general relief.

The answer of the defendant admits the partnership, its terms and the fact of dissolution. But most of the other allegations of the complaint are denied wholly or in part. The defendant claims that at the time of the dissolution of the partnership there was a full and final settlement between him and the plaintiff; that the plaintiff assumed all the liabilities of the concern, and fully released him from all claims whatsoever, in consideration of the transfer to plaintiff of the stock of goods then in the store, and the outstanding accounts. The defendants admit that they used a small amount of the funds of the partnership in building their house, but allege that this was done with the knowledge and full consent of the plaintiff, and they claim that the land was purchased and the house mainly constructed with their own funds, and upon their own credit. Upon the filing of this answer, the case was referred with directions to the referee to take the testimony and report the facts, conclusions of law, and a proper judgment. After a hearing, the referee reported findings in favor of the plaintiff on all the material issues raised by the pleadings, together with his conclusions thereupon, and a judgment in accordance with his conclusions. The judgment so reported was ordered to be entered as the judgment of the court. A motion by defendants for a new trial was overruled, and they have appealed from the judgment and from the order overruling their motion for a new trial.

The first question presented for our consideration arises upon the objection of the respondent, that this appeal does not lie, because the judgment appealed from is not final, but merely interlocutory.

The judgment assumes to be, and according to its terms is, interlocutory, and not final; but whether it may not be really and substantially a final judgment, within the meaning of the provisions of the statute respecting the right of appeal, is a question of some difficulty. The findings of the referee, as above stated, are in favor of the plaintiff on all the material issues involved in the case, but he reports

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that the amount of the indebtedness of the partnership cannot be determined without making a portion of its creditors parties to this action, and compelling them to bring in their claims and litigate them. That in consequence of this uncertainty as to the indebtedness of the firm, it is impossible to state the account between the partners, and that no final decree can be made until the creditors have been brought in, and the validity and amount of their claims determined, nor until, by the sale of the property claimed by defendants as a homestead, the amount of the partnership assets is determined.

The decree follows these findings and conclusions of the referee. It appoints a receiver, who is empowered and directed to sell the homestead, so-called; requires the defendants under pain of being held guilty of a contempt of court, to execute a conveyance of said property to the receiver; contains directions for making the creditors of the firm parties to the action, and declares that until these things have been done, and the results reported by the referee, no final decree can be entered in the cause. In the meantime, however, the findings of the referee are definitively adopted, as far as they go, and the further accounting between the parties is required to be based upon the facts so established.

The difficulty of determining whether any appeal lies from this judgment arises from the fact that the action involves two matters which are in a great measure distinct; that one of the defendants, Maria Williams, has no interest in one branch of the proceeding, and that the decree is final as to all matters directly affecting her, while it is merely interlocutory as to other matters affecting her co-defendant.

Maria Williams, if she is a proper party to the action, is so only by reason of her claim of a homestead right in the property which the plaintiff claims to belong to the partnership, and this decree is final upon that point. If she has a right of appeal in the action which she can exercise independently of her husband—and it will not be denied that she has such a right—there seems to be no good reason why she may not prosecute her separate appeal at this time

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from a decree, which, so far as her rights are concerned, is as final and conclusive as it can ever be made. On the other hand, there are strong reasons why she should be allowed to prosecute her appeal at this time, for otherwise she may be deprived of her homestead pending a protracted litigation concerning matters with which she has nothing to do.

Our opinion is, that the appeal of Maria Williams was not prematurely taken. But we are of opinion that both the appeal and the motion for a new trial on the part of her husband were premature and that his appeal must be dismissed.

Of course, if it had been necessary or even permissible for him to move for a new trial, upon receiving notice of the filing of the report which has been made by the referee in this case, it would follow that his appeal from the order overruling his motion for a new trial would lie, for otherwise he might be wholly deprived of any appeal from that order by the expiration of the time within which such an appeal may be taken before the rendition of any final judgment. But he was not required nor could he be permitted to move for a new trial until the issues between him and the plaintiff had been fully and finally decided. Before a party can move for a new trial the action must have been, not partially, but fully tried (Pr. Act, sec. 197; 27 Cal. 385; 41 Cal. 406), and this action has been finally and fully tried only so far as Maria Williams is concerned. The fact that she and her husband joined in the motion and in this appeal, does not invalidate the motion or the appeal so far as she is concerned, nor will it prevent him from making his motion and taking his appeal when the proper time arrives.

We will proceed to examine those assignments of error which are involved in the appeal of Maria Williams:

First. Her demurrer to the complaint was properly overruled. It stated a cause of action against her. Her husband's declaration of homestead gave her an interest in the premises occupied by them which could only be barred by an action to which she was a party. The question involved

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in the controversy was whether the property described in the complaint was the homestead of her husband and herself, or the partnership property of her husband and the plaintiff, and certainly she was a necessary party to a complete determination of that question. (Pr. Act, sec. 13.) And if the land had been purchased and the house erected with money abstracted from the partnership funds of an insolvent firm, there can be no doubt that they were partnership property and liable for the debts of the firm. (Story on Part., sec. 97.)

Second. The order that the property should be sold without being subject to redemption was not erroneous. The provisions of the practice act with reference to sales of property under execution have no application to this case. Here the property of an insolvent partnership is ordered to be sold in order to pay the partnership debts. Where in such a case could a right of redemption reside? Not in the firm, certainly; for that has ceased to exist. Not in one of the partners to the exclusion of the other, for their rights are equal, and not in each severally, because that is impossible. As to the appellant, the result of the decision is that she never had any right to or interest in the property. It was at all times the property of the partnership, and no person can acquire a right to the lands of another by claiming them as a homestead.

Third. Neither was the order that the sale should be within view of the property erroneous. The court had the power to prescribe the time and manner of making the sale, and if the mode prescribed is reasonable and just, it is not erroneous simply because it does not strictly conform to the provisions regulating sales under executions.

Fourth. When the referee was appointed in this case he was required to make his report by the twenty-seventh of February, 1874. For some reason which is not explained, he did not commence taking the testimony until nearly a year had elapsed after the time when his report should have been filed. Defendants objected on the hearing before the referee, and the appellant urges the objection here that the authority of the referee to hear the case expired at the date

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when he was ordered to report. No authority is cited to sustain this proposition, and according to our construction of the order of reference that part of it which required the report to be filed within a certain time was not a limitation upon the power of the referee, but merely a direction to proceed expeditiously, a direction which he ought to have obeyed, and for neglecting which he might have been removed upon application of either party. But as neither party demanded a revocation of his authority it continued in full force.

Fifth. The grounds of the motion for a new trial are not supported by any sufficient specification of the particulars in which the findings are against the evidence. But without resting our decision upon that ground, we are satisfied that the order overruling appellant's motion was correct. The evidence very clearly shows that the partnership was insolvent, and that J. A. Williams was largely indebted to it. It is conceded that partnership funds were used to a considerable extent in the erection of the house claimed as a homestead, and there is some evidence that the land was purchased and the improvements erected with money derived from that source alone. The findings of the referee to that effect are therefore not unsupported, and must stand. That they are sufficient to support the judgment has been shown.

The appeal of the defendant, J. A. Williams, is dismissed. and the judgment against Maria Williams is affirmed.

[No. 793.]

TRAVIS M. JOHNSON, APPELLANT, v. EUREKA
COUNTY, RESPONDENT.

JURISDICTION OF COMMISSIONER MUST BE AFFIRMATIVELY SHOWN.—Whenever the jurisdiction of the board of county commissioners depends upon certain facts to be ascertained and determined by it, its record should show that it acted upon the evidence presented and adjudged the facts to be sufficient.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion.

Argument for Respondent.

S. Hetzel and T. Laspeyre, for Appellant:

I. The statutes of March 11, 1865 (2 Comp. Laws, 171-2), under which the commissioners acted, does not require that all facts set forth in the petition, or that any evidence of the sufficiency of the petition shall appear upon the record to confer jurisdiction. The order shows upon the records of the board sufficient evidence of the sufficiency of the petition; the board acted upon the petition when they made this order. The evidence shows that this tax was levied and collected for the purpose of a police fund and applied as such. The omission of the board to spread all the evidence relative to the sufficiency of the petition was nothing more than an irregularity for which the rights of the plaintiff could not be prejudiced or affected.

II. The commissioners, as officers, were the agents of a corporation, exercising corporate powers as a board, and as such entered into an express contract with plaintiff, and accepted the benefit of his labor and services, and hence the corporation is liable. (*Wait v. Ormsby County*, 1 Nev. 377; *Argenta v. City of San Francisco*, 16 Cal. 255; *Kilbourne et al. v. St. John et al.*, 59 N. Y. 21.) For authorities on ratification: see *Clark v. Lyon County*, 8 Nev. 181; *People v. Swift*, 31 Cal. 26; Story on Agency, 250-252; Story on Contracts, 72, 160-4, 312-18.

George W. Merrill, District Attorney of Eureka County, Thomas Wren, and Crittenden Thornton, for Respondent:

I. The act of the commissioners requesting the sheriff to appoint policemen was null and void for want of jurisdiction. (*Paul v. Armstrong*, 8 Nev. 82; *State ex rel. Swift v. Ormsby County Commissioners*, 6 Nev. 93; *Hess v. Washoe County Commissioners*, 6 Nev. 104; *State ex rel. Thompson v. Board of County Commissioners of Washoe County*, 7 Nev. 83; *Hetzel v. County Commissioners of Eureka County*, 8 Nev. 309-359; *State of Nevada v. Central Pacific Railroad Company*, 9 Nev. 79; *The People ex rel. De Fries v. The Supervisors of Marin County*, 10 Cal. 344.)

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By the Court, HAWLEY, C. J.:

On the twelfth day of May, A.D. 1873, the board of county commissioners of Eureka county, upon the presentation of a petition purporting to be a petition of a majority of the citizens of the town of Eureka, praying that the provisions of an act of the legislature of this state, entitled "An act to provide policemen in unincorporated cities, towns, and villages," approved March 11, 1865 (Stat. 1864-5, 396), be extended to the town of Eureka, and requesting the appointment of two policemen for said town, and the levying of a tax as provided for in said act, made the following order, viz.: "Ordered that the petition of the citizens of Eureka, asking the appointment of two policemen, be granted, and a tax be levied upon the assessed value of the property in said town for the maintenance of such police force in accordance with the statute, to wit, ($\frac{1}{4}$) one-quarter of one per cent., and that the assessor be directed to make such assessment."

The plaintiff Johnson having been appointed a policeman by the sheriff of Eureka county, in pursuance of said order, brings this suit to recover the sum of one thousand and fifty dollars, amount alleged to be due him for services as such policeman.

The court below dismissed the action upon the ground that the commissioners had no jurisdiction to make the order, it not appearing from the records of said board "that any evidence was offered to show that the signers of said petition were resident electors of said town of Eureka, or that it contained the names of a majority of the resident electors of said town of Eureka; nor do the records of said county commissioners show that they found as a fact that the names signed to said petition were the names of resident electors of the town of Eureka, or that a majority of the resident electors had signed said petition."

We think the court did not err in dismissing the action. This court has frequently decided that the board of county commissioners is of special and limited jurisdiction; that nothing in regard to its proceedings is to be presumed in

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its favor, and that its records must affirmatively show the necessary jurisdictional facts. (*The State v. The Board of County Commissioners of Washoe County*, 5 Nev. 319; *Swift v. The County Commissioners of Ormsby County*, 6 Nev. 97.)

To the same effect are the decisions of courts in other States. (*Rosenthal v. The Madison and Indianapolis Plank-road Company*, 10 Ind. 361; *The People ex rel. De Fries v. The Supervisors of Marin County*, 10 Cal. 344; *Finch v. Tehama County*, 29 Cal. 455.)

Whenever the jurisdiction of the board depends upon certain facts, to be ascertained and determined by it, its records should show that it acted upon the evidence presented, and adjudged the facts to be sufficient.

The judgment of the district court is affirmed.

[No. 733.]

A. A. YOUNG, RESPONDENT, v. F. W. CLUTE,
APPELLANT.

POWER OF COURT TO REVOKE ORDER OF CONTINUANCE AND APPOINT A REFEREE.—The court, after continuing the cause for the term, vacated the order of continuance, and referred the cause to a referee: *Held*, that this action of the court was not erroneous.

IDEM—POWER OF A REFEREE.—The referee, after the order of reference is made, has the same power to continue the hearing, from time to time, as the court would have had if the case had been tried before it without a jury.

FINDINGS OF COURT—WHEN SHOULD BE MADE SPECIFIC.—In the settlement of partnership accounts, the referee, in a general finding, allowed appellant a certain sum of money without giving a statement of the particular accounts allowed: *Held*, that appellant, if he desired to have the account reviewed, should have asked for a specific finding containing an itemized statement of the accounts allowed, and also a statement of the particular accounts disallowed by the referee.

DISSOLUTION OF COPARTNERSHIP—PAYMENT OF TAXES.—Where an agreement was made between C. and Y., copartners, that the partnership existing between them should be dissolved; that C. should take all the real estate and personal property of the firm at a certain value, nothing being said about the taxes then existing against the property; that C. should pay the indebtedness of the firm included in a certain list, and that the liability of the firm, not included in the list, should be paid out of money

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collected from the outstanding accounts due the firm: *Held*, that the taxes should be paid out of the copartnership's funds.

IDEM—Costs.—The allowance or disallowance of costs in actions to settle copartnership accounts is within the discretion of the court.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The facts are sufficiently stated in the opinion.

Robert M. Clarke, for Appellant:

The referee erred in refusing to allow the account paid by Clute, for taxes, against the firm property.

This tax was a debt for the payment of which Clute and Young were jointly and severally personally liable; (Rev. Laws., sec. 6, 12, 25, 29, 35; 2 Comp. Law, sec. 3130, 3136, 3149, 3153, 3159; *People v. Seymour*, 16 Cal. 332; *Perry v. Washburn*, 20 Cal. 318, 351; *City of Oakland v. Whipple*, 39 Cal. 115,) and was a lien upon the property assessed, not to be satisfied or removed without payment of the tax or sale of the property for taxes. (Vol. 2 Comp. Laws, secs. 27, 31.)

The tax became a personal charge against the parties, and a lien upon their property from and after the first Monday in April.

No informality in the assessment could operate to terminate the liability or discharge the lien. The liability existed without the assessment. The assessment is but a means to fix the amount of the tax. The assessment is sufficient to fix the amount of the tax, and any informality which exists is immaterial, and not a defense. (2 Comp. Laws, sec. 3156.)

Clute paid the tax for the firm as its agent, and as the agent of Young. He made the payment in good faith, and Young is bound by the act, notwithstanding the court may be of opinion that by litigation payment could have been avoided. (7 Paige, ch. 483; 1 Edw. ch. 104.)

Bishop & Sabin, also for Appellant:

I. The conversations of Clute and Young were merged in the written agreement. (10 Cal. 106; 12 Cal. 168; 1 Greenl.

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on Ev. secs. 87, 275-7; 281-2; 1 Phillips on Ev., notes 547, 555, 561-7; 2 Parsons on Cont. 60-3.)

II. It was the duty of each former partner, after dissolution, to collect in the debts due the firm, and discharge its liabilities. (Story on Part., sec. 326-8 *et seq.*) The entry of judgment for costs against the defendant Clute is erroneous. (7 Paige, Ch. Rep. 483; 2 Daniels Ch. Pr. 1400.)

A. B. Hunt, for Respondent:

I. Under the general finding, it is impossible to tell what particular accounts were allowed by the referee. As there is no specific finding upon this point, the court will not review the action of the referee. (*Warner v. Holman*, 24 Cal. 229; *Cook v. Pablo de la Guerra*, 24 Cal. 241; *Lyons v. Leimback*, 29 Cal. 140; *Lucas v. City of San Francisco*, 28 Cal. 596; *James v. Williams*, 31 Cal. 212; *Merrill v. Chapman*, 34 Cal. 252; *Morrill v. Chapman*, 35 Cal. 87; *Smith v. Cushing*, 41 Cal. 99; *Poppe v. Athearn*, 42 Cal. 617; *State v. Manhattan S. M. Co.*, 4 Nev. 336; *Warren v. Quill*, 9 Nev. 263.)

II. Clute does not claim anything paid for taxes for the benefit of the firm. He only claims that he paid debts amounting to two thousand three hundred and sixty-six dollars and nineteen cents.

A tax is not a debt. In its general acceptation, a debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor between the taxpayer and the State; it does not draw interest; it is not the subject of attachment; and it is not liable to set-off. It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the taxpayer. It operates *in invitum*. (*City of Camden v. Allen*, 2 Dutcher's New Jersey, 398; *Pierce v. City of Boston*, 33 Met. 520; *Shaw v. Pickett*, 26 Vt. 482; *Perry v. Washburn*, 20 Cal. 350; *Clark v. Nevada Land and Mining Company*, 6 Nev. 208; *Lane County v. Oregon*, 7 Wall. 71.)

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Hence, upon no rational view of the subject could taxes in this State be called debts; and if not debts, when the defendant paid the taxes on the third day of November, 1873, he paid no debt of the firm of Clute & Young.

III. As the foundation of the right to recover and the obligation to pay a tax are based upon a valid assessment—an invalid assessment and the tax levied thereon impose no obligation to pay the taxes so levied, and create no lien on the property so assessed. (*People v. Travis*, 37 Cal. 262.)

The assessment in this case was utterly void and imposed no obligation to pay the tax, and created no lien on the property assessed. (*Wright v. Cradlebaugh*, 3 Nev. 345.)

IV. Admitting that the reasons assigned by the court for not allowing the amount paid for taxes are wrong, still if the court arrived at the correct conclusion, the judgment should be sustained. (*Bolton v. Stewart*, 29 Cal. 615; *Grant v. Moore*, 29 Cal. 644; *Coghill v. Marshall*, 29 Cal. 673.)

By the Court, HAWLEY, C. J.:

On the eighth day of September, A. D. 1873, the copartnership which had for a period of nearly three years previously existed between the plaintiff and defendant as equal copartners in the business of merchandising at Pioche, in Lincoln county, Nevada, under the firm name of Clute & Young, was dissolved by mutual consent.

The defendant took all the real estate and personal property, goods, wares and merchandise of the firm at the value named in the inventory, to wit: thirty-three thousand two hundred and six dollars and thirty-seven cents.

On the twentieth day of October, A. D. 1873, when the invoice was completed, and the value of the property ascertained, a statement was prepared showing the amount of the indebtedness of the firm to certain parties in the State of California from whom the firm had bought goods, together with certain accounts which the firm owed in Pioche, Nevada, in all amounting to the sum of nine thousand five hundred and twelve dollars and twenty-nine cents, which indebtedness the defendant assumed and agreed to pay; and this amount, together with plaintiff's personal indebtedness

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to the firm of six hundred and sixteen dollars and eleven cents, was by the agreement of the respective parties deducted from the total value of the property, and the defendant then paid to plaintiff one-half of the remainder. The plaintiff executed and delivered to defendant a deed of all his right, title and interest in the real estate, and surrendered up and delivered to defendant the possession of all his right, title and interest in the stock of goods, wares and merchandise, and all the personal property belonging to or owned by the firm, except the money on hand and the accounts due and owing to the firm.

The indebtedness of the firm in connection with their business at Pioche, not included in the list of nine thousand five hundred and twelve dollars and twenty-nine cents, was to be paid out of the accounts due the firm when collected.

This suit was commenced on the fifth day of March, A. D. 1874, to compel an accounting of the copartnership transactions after the dissolution. The court, after continuing the cause for the term, vacated the order of continuance and referred the cause to a referee, "to report the testimony, findings of fact, conclusions of law and submit a judgment."

After the cause was referred the hearing was continued by the consent of the respective parties from time to time, and was not finally submitted to the referee until after the expiration of the term of court at which the order of reference was made.

The referee reported a judgment in favor of the plaintiff for one thousand four hundred and fifty-one dollars and forty-two cents, with costs of suit taxed at five hundred and thirty-five dollars and thirty-five cents, which was entered as the judgment of the court. The defendant moved for a new trial, which was refused. This appeal is taken from the judgment and also from the order overruling defendant's motion for a new trial.

First. It is claimed by appellant that the court erred in vacating the order of continuance, and that the referee lost jurisdiction of the case by the lapse of the term of court at which he was appointed. Neither of these positions are

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maintainable. It was proper for the court, upon good cause shown, in the exercise of its sound discretion, to vacate the order of continuance and to refer the cause. After the reference was made the referee had the same power to continue the hearing, from time to time, as the court would have had if the case had been tried before it without a jury.

Second. It is contended by appellant that the statement of the indebtedness of nine thousand five hundred and twelve dollars and twenty-nine cents, which he admits he assumed and agreed to pay, was not a complete list of the indebtedness of the firm; that several of the accounts contained therein were not accurately made out, and that upon settlement thereof, he was compelled to pay a greater sum than was therein specified. He denies that the list when made out was agreed to as correct, and, upon this point there is a direct conflict of testimony. He claims that the referee erred in not allowing him all the various items and accounts which he claimed he had paid for the firm, in excess of the sum of nine thousand five hundred and twelve dollars and twenty-nine cents.

He prepared a statement showing that he had paid various accounts against the firm in excess of said sum, amounting in the aggregate to the sum of four thousand three hundred and fourteen dollars and thirty-two cents, and of this amount the referee in a general finding allowed him the sum of one thousand and ninety-one dollars and fourteen cents. We think there is such a conflict of evidence as to the amount of the accounts actually paid by appellants as to fully warrant the conclusion reached by the referee. But, independent of this question, it is sufficient for us to state that it is impossible from the findings of the referee to designate with any degree of certainty the particular items of the accounts allowed by him in making up the total of one thousand and ninety-one dollars and fourteen cents, and hence it is impossible for us to determine what particular accounts were disallowed by him, except those mentioned in his report and referred to in the opinion of the court overruling defendant's motion for a new trial. If appellant desired to have the several accounts paid out by him reviewed by this

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court; he ought to have asked for a specific finding containing an itemized statement of the accounts allowed, and also a statement of the particular accounts disallowed by the referee.

Third. Did the referee err in refusing to allow appellant the sum of six hundred and eighty-eight dollars and forty-five cents, the amount paid for taxes levied upon the property of the firm of Clute & Young, for the year 1873?

This is the only difficult question presented in this case. The property was assessed and taxes levied prior to the sale of Young's interest to Clute. It is not alleged in the complaint that Clute assumed or agreed to pay any indebtedness of the firm not included in the list of nine thousand five hundred and twelve dollars and twenty-nine cents; nor is it averred that Clute assumed or agreed to pay any indebtedness or liability of the firm in the State of Nevada. The allegations of the complaint are that defendant Clute assumed and agreed to pay "all debts contracted by, and due or owing from said firm to any and all parties or firms in San Francisco, and all debts due or owing from said firm to said defendant." Nothing was said about the taxes at the time of the dissolution.

From the pleadings and the proofs, we think the true intent and meaning of the agreement of the copartners at the time of the dissolution was that all the indebtedness and liability of the firm in the State of Nevada, not included in the list of nine thousand five hundred and twelve dollars and twenty-nine cents, was to be paid out of money collected from the outstanding copartnership accounts; and, as the tax was an existing liability against the firm at the time of the dissolution; and was not included in the list of indebtedness which Clute assumed and agreed to pay, it follows that the referee erred in refusing to allow this account.

This, however, is not such an error as to call for a reversal of the case. The judgment can be modified so as to conform to the views herein expressed.

Fourth. By the provisions of our statute the allowance or disallowance of costs in actions like this is left to the discretion of the court. (1 Comp. L., 1539,) and from an ex-

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amination of the testimony in this case we are satisfied that the court did not abuse its discretion in allowing costs in favor of the plaintiff.

The judgment of the district court is modified by reducing the amount of the judgment to the sum of one thousand one hundred and seven dollars and twenty cents, and costs. Appellant to recover the costs of this appeal.

[No. 750.]

ANDREW ALLISON, RESPONDENT, v. SARAH HAGAN,
APPELLANT.

ERROR MUST BE AFFIRMATIVELY SHOWN.—If appellant presents no argument or authorities in support of an alleged error in the court below, this court will not consider the assignment, unless the error is so unmistakable that it reveals itself by a casual inspection of the record.

FRAUDULENT GRANTOR CANNOT OFFER EVIDENCE TO SHOW THAT CONVEYANCE WAS FRAUDULENT.—December 12, 1870, appellant conveyed certain real estate to K. January 3, 1871, K. conveyed the same property to Y. September 4, 1871, Y. conveyed it to appellant. April 15, 1871, respondent recovered judgment against K., had the property sold and became the purchaser at an execution sale, and thereafter commenced this suit to recover the property. Upon the trial appellant offered to prove that her deed of December 12, 1870, was made for the purpose of placing the property where her creditors could not reach it, so as to enable her to get money from New York to pay her liabilities; that K. agreed to reconvey the property upon demand; that the conveyances from K. to Y. and from Y. to her were made in furtherance of this agreement, she having in the meantime paid her liabilities. The court refused to allow this testimony: *Held*, that this action of the court was correct; that it was not an offer to prove a trust, but was an offer to prove that K. was a fraudulent grantee as against the creditors of appellant.

IDEM—RIGHTS OF CREDITORS.—Appellant's creditors could have defeated the conveyance upon the ground of want of consideration, or on the ground of fraud, but neither K. nor appellant could do so as against K.'s creditors. Subsequent to that conveyance the property was subject to the claims of K.'s creditors and K. could have sold it and given as good title to it as any other property owned by him.

IDEM.—As between the parties to a fraudulent conveyance or between a fraudulent grantee and his creditors, courts will not permit either the fraudulent grantor or grantee to be heard in avoidance of the fraudulent act.

IDEM—BONA FIDE PURCHASER.—It is a well-settled rule in equity that a purchaser with notice from a *bona fide* purchaser for a valuable considera-

Argument for Appellant.

tion, who bought without notice, may protect himself under the first purchaser. The only exception to this rule of law is where the estate becomes re-vested in the original party to the fraud, when the original equity will re-attach to it in his hands.

WHEN INSTRUCTIONS SHOULD BE REWRITTEN—MODIFICATION OF.—The court modified an instruction by erasing the words: "and the jury must find for the defendant" with one stroke of the pen, leaving them legible to the jury: *Held*, that it was the privilege of appellant to ask leave to rewrite the instruction, or obliterate the rejected words, and not having done so, she is not in a position to complain of the action of the court, the instruction being otherwise correct.

INSTRUCTIONS MUST BE CONSTRUED AS A WHOLE. — In determining whether any given instruction is erroneous, the whole must be taken together, and considered as an entirety.

IDEM—EFFECT OF CONVEYANCES MADE TO DEFRAUD CREDITORS.—The following instruction: "If you believe, from the evidence, that the deed from K. to Y. was made with the understanding that Y. was to hold the property until such a time as K. desired, and that then it should be conveyed by Y. as K. should direct, and that such conveyance was intended to hinder and delay the creditors of K., and that the defendant knew of such understanding, and she further knew the fact before the conveyances were made to her by Y. and K. on the fourth day of September, 1871, that K. was indebted to plaintiff at the time, your verdict must be in favor of the plaintiff:" *Held*, correct.

IDEM. — The court gave the following instruction: "If the jury believes, from the evidence, that the conveyance made by K. to Y., on the third of January, 1871, was made for the purpose of hindering, delaying or defrauding the creditors of K. in recovering the debt due by K. to plaintiff, and that the defendant was aware that said conveyance was made for such purpose before the conveyances were made by Y. and K., your verdict must be for plaintiff." *Held*, correct.

INSTRUCTIONS—DUTY OF COUNSEL.—If counsel for appellant thought the jury were not cognizant of the construction placed upon the statutes by the court in its instruction, the same being correct, it was their duty to prepare proper instructions upon the subject, and ask the court to give them.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts appear in the opinion.

R. S. Mesick and W. S. Mesick, for Appellant:

I. The court erred in refusing to allow the proof offered by plaintiff as to the consideration of the deeds.

If admitted it would have shown, or tended to show, that Kerrin never had any estate under the deed of December

Argument for Respondent.

12, 1870, which in equity ought to have been subjected to the claims of his creditors, but that on the contrary, he was morally and equitably bound to preserve the property for appellant, and to reconvey it to her under all contingencies, and that his deed to Young and Young's deed to her only resulted in an honest discharge of this obligation on his part, and an execution of the trust.

Even had the defendant obtained from Kerrin only a declaration of the trust, upon which, according to this proof, he received the estate from defendant, instead of the two deeds which resulted in the execution of the trust, no court of equity or law would hold that her rights must be sacrificed to the claims of Kerrin's creditors. (*Sime v. Howard*, 4 Nev. 473; *Davis v. Graves*, 29 Barb. 485; *Lonsbury v. Purdy*, 11 Barb. 491; *Keirsted v. Avery*, 4 Paige Ch. 14; *Buchan v. Sumner*, 2 Barb. Ch. 207.)

II. The court erred in giving the instructions specified in the assignments of error.

Lewis & Deal, for Respondent:

I. It is not admissible to show a want of consideration for a deed for the purpose of defeating it. The authorities hold that a person having made a deed for the purpose of defrauding or hindering his creditors, the deed cannot be set aside by the grantor. Such a deed is good and valid between the parties. (Bump on Fraudulent Conveyances, 442 *et seq.*, and cases there cited; 15 Ohio, 408; 18 Ohio, 418; 3 Sandford's Ch. 512; Willard's Equity, 240; 16 John. 189.) It cannot be said that the creditors stand in any worse position simply because Kerrin transferred the property to persons knowing of his fraudulent purpose, who paid no consideration therefor. In such a case the property is treated as if there had never been any transfer or conveyance of it; and the creditors are allowed to take it as if the title still remained in such voluntary or fraudulent grantor. (65 Barb. 227; *Id.* 286; 13 Wend. 570; 8 Cowen, 238; Bump, 507.)

II. The court did not err in refusing to give, or in giving, the instructions complained of by appellant. (Willard's

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Eq. Jur. 256; *Jewett v. Palmer & May*, 7 Johns. Ch. 65; Bump on Fraudulent Conveyances, 282, 559; Kerr on Fraud and Mistake, 384.)

III. The defendant cannot impeach our title, because she is not a creditor, nor a *bona fide* purchaser from Kerrin (Bump on Fraud. Convey. 477; 2 Story Equity, 1502; 2 John. Ch. R. 65); nor does our statute change the rule as it existed under the statute of 13 Elizabeth. (1 Story Eq. Jurisp., sec. 359.) No informality or omission on the part of the sheriff in making the sale of the property under our judgment, which did not render our deed from him absolutely void, will avail the defendant in this proceeding. (38 Cal. 382; 21 Cal. 59; 17 N. Y. 276; Rorer on Judicial Sales, 234, sec. 656; 6 Monroe, 110; *Blood v. Light*, 38 Cal. 649; 6 Hand. 386; 55 Barb. 9; Waits' N. Y. Code, 412.)

IV. The defendant's title, as against the plaintiff, is absolutely null and void. (Bump on Fraudulent Conveyances, 453–477; Kerr on Fraud, 196, 197, and note, 199; 17 Conn. 493; 1 American Lead. Cases, 49; 1 Comp. L. 297.) If defendant had no title, the plaintiff is entitled to recover the possession. Fraud follows the property in the hands of all parties who are not *bona fide* purchasers. (65 Barb. 227; Id. 286; 2 Cowen & Hill, 854; 3 Duer, 341; 6 Duer, 232; 13 Wend. 570; 8 Cowen, 233–245; Bump, 507; 14 Peters, 84; *Remington v. Linthicum*, 24 How. 406; 2 Blackf. 230; Bump, 507.)

By the Court, LEONARD, J.:

This is an action of ejectment by respondent, plaintiff, against appellant, defendant, to recover possession of an undivided one-half of lot five, in block sixty-six, range C, in Virginia city, Storey county, Nevada, together with the appurtenances, etc.

The cause was tried by a jury, and the verdict was in favor of respondent.

Thereupon the court ordered and adjudged that the plaintiff was the owner of an undivided one-half of said premises, and that he was entitled to recover possession of the whole of said premises from defendant, and that plaintiff

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be let into the possession thereof as a tenant in common with defendant.

Appellant moved for a new trial on several grounds. The motion was denied by the court and defendant duly excepted.

This appeal is taken from the judgment and from the order denying defendant's motion for a new trial.

The complaint is an ordinary pleading in ejectment, wherein plaintiff alleges that he is, and since April 15, 1871, has been the owner, and entitled to the possession of the premises in dispute; that while he was so the owner, etc., defendant, on December 28, 1874, ousted plaintiff, and now unlawfully withholds them from plaintiff. Defendant denies, generally, the allegations of plaintiff's complaint and avers that on the fourth day of September, 1871, she was the owner of, and in the possession of, and from thence hitherto, has been and now is, the owner of, in the possession of, and entitled to the possession of the whole thereof.

There are thirteen assignments of error stated in the transcript, but the first, second, third, fifth and ninth assignments have not been noticed by appellant's counsel. They will not be considered by this court, but will be regarded as waived. If appellant presents no argument or authorities in support of an alleged error in the court below, this court will not consider the assignment, unless the error is so unmistakable that it reveals itself by a casual inspection of the record. Perceiving no errors in the assignments above mentioned, they will not be noticed further.

The following facts, gathered from the agreed statement on motion for a new trial, are all that need be given at this time:

The premises described in the complaint, prior to June 1, 1869, were the property of Hugh Kerrin and W. E. Brown, who owned them in equal shares, and appellant occupied them as their tenant. On the day last named, Kerrin conveyed to appellant an undivided one-half interest in said premises, the consideration stated in the deed being five hundred dollars. There was testimony tending to show that this deed was given to secure a debt of five hundred

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dollars due appellant from one Lizzie Greenwood. October 12, 1869, Brown conveyed to appellant an undivided one-half interest in said premises, the consideration therefor being twelve hundred dollars. December 12, 1870, appellant conveyed to said Kerrin, and January 3, 1871, Kerrin conveyed the same to one Jacob Young, Jr. September 4, 1871, Young conveyed the same to appellant, and on the same day Kerrin also executed and delivered to defendant a deed of the same property. All the conveyances above mentioned were duly recorded in the office of the recorder of Storey county, on or about the date of each, respectively.

April 15, 1871, respondent recovered judgment in the first judicial district in and for said Storey county, against said Hugh Kerrin, in the sum of nine hundred and seventeen dollars and eighty-five cents and costs, upon a debt which originally accrued in May, 1869, from Kerrin to respondent, and which was due prior to and at the time of the execution of the deed from Kerrin to Young, dated January 3, 1871. Kerrin had no other property than that so conveyed to Young sufficient to satisfy said judgment. Said judgment was duly docketed April 15, 1871, and execution was duly issued thereon to the sheriff of Storey county, May 6, 1874, against the property of Kerrin. All the right, title and interest which Kerrin had in said property on the fifteenth of April, 1871, or that he afterward had therein, was sold at sheriff's sale, under said execution, to respondent, for fourteen hundred dollars.

December 16, 1874, respondent received the sheriff's deed of the property sold at sheriff's sale, to wit, an undivided one-half interest.

Respondent claims the premises in dispute, under the last-named deed, and urges that the conveyances from Kerrin to Young, dated January 3, 1871, and from Kerrin and Young to appellant, dated September 4, 1871, were fraudulent and void as to him.

Upon the trial, respondent introduced evidence to show that the deed from Kerrin to Young was made for the purpose of defrauding the creditors of Kerrin, and especially respondent out of their and his demands against Kerrin;

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that Young knew such to be the object of said conveyance; that appellant knew said conveyance was made for such purpose, and that she advised the making of the same for that purpose; that no consideration was paid either by Young to Kerrin, or by appellant to Young or Kerrin; that a twenty-dollar piece was passed by Young to Kerrin at the time of the conveyance to Young, and that the money so passed was first given to Young by Kerrin for the purpose of having it passed as a consideration for making the deed last mentioned; that Young agreed at the time of the conveyance to him to reconvey the property in controversy to Kerrin whenever requested by the latter to do so, and that, until such property was so reconveyed, Young should pay to Kerrin all rents received therefor; that Kerrin directed Young to make the conveyance to appellant, dated September 4, 1871, and that the same was made in pursuance of such direction; that appellant was informed by Kerrin as to all the transactions and agreements above mentioned before the conveyance by Kerrin to Young, January 3, 1871, and that shortly after the date last aforesaid appellant stated to respondent's witness, who testified to the fact, that the conveyance, from Kerrin to Young, was made for the purpose of keeping respondent from collecting the demand for which he obtained judgment above mentioned, under which the sheriff sold the property in controversy.

Appellant introduced evidence tending to disprove some of the facts shown by respondent, and to establish the issues in the case for her. But, inasmuch as the statement does not specify the particulars wherein the evidence is insufficient to justify the verdict and judgment, and since the appellant relies on this appeal, only upon errors in law occurring at the trial, a further statement of the evidence and proceedings in the court below need not be made, except so far as may be necessary in order that appellant's specifications of alleged errors in law may receive proper examination.

The fourth assignment of error, and the first relied on by appellant, reads as follows: "The court erred in sustaining the objection of plaintiff to the further proposed testimony

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of the defendant, as a witness on her behalf, upon the subject of the occasion and inducement of her making the conveyance of the property to Kerrin, on the twelfth day of December, 1870, and in refusing to allow the proof to be made by her, that that deed was made by her to Kerrin without any consideration whatever therefor, and in trust to be held by said Kerrin for her, while she went to New York to get money, with which to pay her debts, and upon an agreement between him and her, made at the time of said conveyance, that upon her doing so he would reconvey the property to her upon demand, and that the conveyance from Young to her was made in fulfillment of said agreement, and to reinvest her with the title to her property, she having procured said money and paid off her liabilities."

In this connection the transcript shows the following as the proceedings of the court: "Defendant testified that Kerrin paid nothing for the conveyance of twelfth December, 1870. That conveyance was made by me to him wholly without consideration. The occasion and inducement of my making that conveyance were these: My children were sick and I was greatly involved in debt in town, and I did it to get time to go East and get money from Mr. Thompson."

"Whereupon the plaintiff objected to any further statement by the witness of the said occasion and inducement, and counsel for defendant then and there, duly stated to the court that they proposed, by this witness, * * * to prove that the making of the deed by her to Kerrin of the twelfth of December, 1870, was without consideration, and that it was made for the purpose of placing the property where the defendant's creditors could not attach it, or reach it by legal process for a time, while she might go to New York and get money sufficient to pay off and discharge her liabilities, and that it was agreed between her and Kerrin, when he took said conveyance, that upon her doing so, he would reconvey the property to her, upon demand, and that the conveyance from Young to her was made in fulfillment of said agreement between her and Kerrin to reinvest her with the title to the property, she having procured said money and paid off and discharged her

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said liabilities. The court sustained plaintiff's objections and refused to allow witness to give the offered testimony, and defendant excepted."

Appellant claims that the proposed testimony would show, or tend to show, that Kerrin held the property solely in trust for her, and that the effect of the deed from Kerrin to Young, taken in connection with the deed from Young to her, was merely an execution of that trust by Kerrin, and no fraud upon respondent as a creditor of Kerrin.

Disregarding the question whether or not an executed parol trust could have been proven in this case, if that could have been done by the offered testimony without also proving the fraud of appellant, it was plain that this was not an offer to prove a trust, express or implied. From the offered testimony Kerrin was not a trustee in any proper sense, but he was a fraudulent grantee as against the creditors of appellant, and Kerrin took the whole title of appellant in favor of his creditors. (29 Barb. 485; 8 Cush. 527; 18 Ohio, 422; 16 Johns. 191.) Appellant's creditors could have defeated the conveyance upon the ground of want of consideration, or on the ground of fraud; but neither Kerrin nor appellant could do so, as against Kerrin's creditors. Subsequent to that conveyance the property was subject to the claims of Kerrin's creditors, and Kerrin could have sold it and given as good title to it as to any other property owned by him. Nor will the courts, as between the parties to a fraudulent conveyance, or between a fraudulent grantee and his creditors, permit either the fraudulent grantor or grantee to be heard in avoidance of the fraudulent act.

By this offered testimony, appellant, the fraudulent grantor, endeavored to show that the conveyance in question was executed and delivered for the purpose of delaying her creditors. "It is equally fraudulent under the statute to make an assignment of property for the purpose of delaying creditors in the collection of their debts, as it is to assign it for the purpose of defeating the final collection of such debts." (Willard's Eq. Jur. 247.)

In 15 Ohio, 428, the court say: "The proof is * * * That the deed was made to defraud the creditors of Edward

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Barton, Sen., and the question now is, does the doctrine of estoppel apply so as that the law will give life and power to such a deed by perfecting the title of the grantee, or will it leave the parties where it found them? To this point a vast number of authorities have been referred to and read. Without controverting the authority of any one of the cases, we will give a direct answer to the question here propounded, and one that is consistent with every case of sound law to be found in the books of reports, as well those cited as others that might have been. Whenever a conveyance has been made to defraud creditors of either an equitable interest in lands, or of a legal estate in lands, the law will leave the parties just where they have placed themselves. It will not permit either to be heard, or to avoid the fraudulent act by showing his own fraud; nor will it permit the heir to avoid the act of his ancestor by proving the fraud of the ancestor under whom he claims. * * * The law leaves both where it found them, and operates upon their acts the same as if good faith and honesty had governed their conduct throughout the iniquitous transaction. By so doing we do not sanction the fraud. The fraud was directed against the creditors. They are not before us. * * He (the plaintiff's lessor) also assumes that all the equitable title remained in Edward Barton, Sen., after his fraudulent surrender, and the conveyance made by his direction; while we hold that he cannot show a particle of equity without showing fraud; and, as a matter of law, counsel admit that to permit him to do so would be grossly erroneous." To the same effect see *Bump on Fraud. Conveyances*, 444 *et seq.*; *Jackson v. Gornsey*, 16 Johns. 188; *Drinkwater v. Drinkwater*, 4 Mass. 356; *Goodwin v. Hubbard*, 15 Mass. 209; *Tremper et al. v. Barton et al.* 18 Ohio, 418; *Parkman v. Welch*, 19 Pick. 236; *Wise v. Tripp*, 13 Maine, 9.

Appellant contends that the offered testimony would have shown, or tended to show, that Kerrin never had any estate, under the deed of December 12, 1870, which in equity ought to have been subjected to the claims of his creditors, but that he was, on the contrary, bound to preserve the property for her, and to reconvey to her, and that his deed to

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Young and Young's deed to appellant only resulted in an honest discharge of his obligation on Kerrin's part and an execution of the trust. From the proposed testimony, there can be no doubt that Kerrin and appellant conspired together to delay the creditors of appellant. The law declares such conduct "an offense against good morals, common honesty, and sound public policy."

"The principle that a collusive contract binds the parties to it is a principle which commends itself no less to the moralist than to the jurist, for no dictate of duty calls on a judge to extricate a rogue from his own toils. On the other principle a knave might gain, but could not lose by a dishonest expedient; and inducements would be furnished to unfair dealing if the courts were to repair the accidents of an unsuccessful trick. It is, therefore, in accordance with a wise and liberal policy, which requires the consequences of a fraudulent experiment to be made as disastrous as possible, that a fraudulent grantee is allowed to retain the property, not for any merit of his own, but for the demerit of his confederate. The law endeavors to environ a debtor with all possible perils, and make it appear that honesty is the best policy." (Bump. 442.)

The law does not teach that an agreement entered into for the purpose of delaying or defrauding creditors of the vendor can be upheld or encouraged by declaring it a trust, nor will courts sustain it as such. If, however, such an agreement has in it any of the elements of a trust, it is still unlawful and void as to the creditors of the grantor, but the conveyance is valid between the parties thereto. Courts will notice the character of the transaction regardless of the name by which it may be called. If it is in fact fraudulent as the statute and the decisions thereon have defined that word, then neither of the parties thereto, in a proper case, can be relieved by calling it a trust. Any debtor who conveys his property for the purpose of delaying or defrauding his creditors expects, when the danger shall have passed, that it will be reconveyed to him; and generally, if not always, there is, probably, an agreement to that effect. In such case the very object of the transfer is to save the prop-

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erty for the benefit of the fraudulent grantor at the expense of his creditors. So, if the offered testimony was admissible in this case, it would be equally so in every case of fraudulent transfer.

Authorities are cited by counsel for appellant, sustaining the doctrine that a prior equitable lien is paramount to a subsequent legal lien; that such legal lien is taken subject to such equitable lien, and that a court of chancery will so control the legal lien as to restrict it to the actual interest of the judgment-debtor in the property, so as fully to protect the rights of those who have a prior equitable lien therein or in proceeds thereof. And from these authorities it is argued, that inasmuch as appellant was in possession of the property in dispute at the time of the sheriff's sale thereof, respondent took it with notice of appellant's equities and subject thereto. But appellant has no equities. She elected to convey the property for the purposes stated. Thereafter the whole legal title thereto was in Kerrin, and courts will not listen to her fraudulent plea made for the purpose of obtaining relief from her own fraudulent acts.

In the cases cited, the equitable title was based upon transactions fair and honest in fact as well as in law. It is in such cases that the authorities cited are applicable. The case of *Davis v. Graves* (29 Barb. 480), is cited by appellant in support of this assignment. The facts stated in that case are, that in 1849, Jacob Graves made a general assignment of all his property for the benefit of his creditors. About the same time, with intent to defraud his creditors, he conveyed a large amount of real estate to his brother, Daniel Graves. In 1851, he caused one Mark H. Sibley to convey a valuable piece of real estate to Daniel, the consideration having been paid by Jacob. No trust was declared in writing, but Jacob, in his answer, alleged that Daniel agreed by parol, at the time of taking the conveyance, to reconvey to him (Jacob) when requested to do so. It turned out that Jacob was not insolvent, and in 1853, the creditors provided for by the assignment having been paid, the assignees re-assigned the property remaining in their hands. On February 1, May 23, and June 9, 1856, Daniel

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executed three promissory notes to one Joseph Cochrane for debts contracted in 1856, the title to said real estate still remaining in him, and he having informed such creditor that the same belonged to him. On June 18, 1856, Daniel conveyed all of said real estate to Jacob, without consideration, and was then insolvent. Cochrane obtained judgment on the notes, and, on proceedings supplementary to execution, the plaintiff was appointed receiver. The action was commenced by plaintiff, as such receiver, to set aside the conveyance to Jacob as fraudulent. The referee decided that the conveyance was not fraudulent as to the creditors of Daniel, and dismissed the complaint. From the judgment entered upon his report, the plaintiff appealed to the supreme court. That court decided, among other things, that the conveyance from Jacob to Daniel was fraudulent as to the creditors of the former; that the property, while in Daniel's hands, was subject to the claims of his creditors as much as any other property to which he had title; but inasmuch as plaintiff had no lien by judgment at the time of the conveyance from Daniel to Jacob, that his right of alienation was perfect in respect to the property, and that it was not a fraud upon his creditors to convey it to the real owner Jacob Graves; that Daniel was not a trustee, but a fraudulent grantee as against the creditors of Jacob, and took an absolute fee in favor of, or as against his own creditors; that, until the creditors of Daniel had acquired liens upon the land, they had no legal or equitable claims in respect to it, higher than, or superior to, those of Jacob Graves. In that case it is difficult to understand just what the court intended to decide, for there are very few facts stated. But if, among other things, it decided that Daniel had a perfect right of alienation before some creditor had obtained a lien upon the property, by judgment or otherwise, but had no such right afterwards, if the conveyance before the lien was acquired, was with an intent to delay or defraud the creditors of Daniel, or if the result was to defraud the creditors of Daniel, then we think the decision was wrong in that respect. We think Daniel had no more right to convey that property before a lien by

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judgment was acquired by his creditors, than after, if such conveyance was made to delay or defraud his creditors, or if the result was the delaying or defrauding of his creditors. The law gives every creditor the right to have the property of his debtor then owned, as well as that subsequently acquired by him, not exempt from execution, subjected to the payment of his debt; and no debtor has a right to transfer it, unless his debts be thereby paid or equally secured. We think, also, that the right of Cochrane to attack the conveyance from Daniel to Jacob, did not depend upon a lien acquired prior to the conveyance from the former to the latter. We are of the opinion further that if Daniel conveyed to Jacob with intent to delay or defraud his creditors, Jacob being cognizant of that intent, or if such conveyance was without consideration, that then the property was subject to the demand of Cochrane. The case of *Jackson ex dem. Van Buren v. Myers* (18 Johns. 425), was an action of ejectment, wherein it appears one Morse recovered judgment against Adsit in an action of slander at the September circuit, 1816. The premises in dispute, which were in possession of Adsit when the said suit was commenced, were seized and sold to Minard by virtue of an execution issued on a judgment in favor of Morse, by deed dated April 24, 1817.

Plaintiff claimed the premises by deed from Minard. Defendant gave in evidence three several deeds, all dated August 26, 1816, for different parcels of the premises in question. The amount of the consideration expressed in the deeds was fifteen hundred dollars. These deeds were executed a few days before the circuit court at which *Morse v. Adsit* was tried. No money was paid when the deeds were delivered; but notes were given for the amount of the consideration, payable in three annual installments. It was generally known at the time that the cause of *Morse v. Adsit* was to be tried at the September circuit in 1816, and the witness had no doubt that the defendant knew that the trial was to come on when the deeds were executed. The defendant was present when the lessor of plaintiff purchased the farm in question, and forbade the sale, and offered to

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show his title. The defendant was a man of considerable means. The jury, under the direction of the court, found for plaintiff. In rendering the opinion on appeal, the court say: "The question arising in this cause is, whether the deeds from Adsit to Myers were made with intent to delay, hinder or defraud creditors or others of their just and lawful actions, debts, damages or demands. The facts stated in the case leave no doubt on my mind that the purchase was made and carried into effect for the purpose of placing Adsit's property beyond the reach of any judgment or execution which Morse might obtain in the action of slander then pending.

"But it is contended that as Morse, the plaintiff in the execution, had no debt or demand against him at the time the conveyance was executed to the defendant, but merely an action *maleficio* pending, the deeds from Adsit to defendant cannot be construed fraudulent within the purview of the statute for the prevention of frauds." * * * On review of the cases and in consideration of the broad expression in the statute, that conveyances 'to defraud creditors and others of their just and lawful actions, damages and demands' are void, I think it is competent for the lessor of the plaintiff who purchased under the execution of *Morse v. Adsit*, to object that the deeds relied on by the defendant are fraudulent and void, on the ground that the action of *Morse v. Adsit*, although found in *maleficio*, is within the spirit, words and meaning of the statute, and, consequently, that the plaintiff is entitled to judgment."

This case is referred to with approval in *Wilcox v. Fitch*, 20 Johns. 471; 5 Cow. 7.

The case of *Chapin v. Pease* (10 Conn. 69), was also an action of ejectment, wherein both parties claimed the premises in dispute, under Barnabas Pease, the plaintiff by the levy of an execution, December 12, 1829; the defendant by a deed from Barnabas Pease to him, dated October 21, 1828. The plaintiff claimed that defendant's deed was executed without consideration, and was fraudulent and void as to the creditors of the grantor; that the plaintiff was one of those creditors, having a debt against him contracted

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in 1826. No consideration passed from defendant, Moses Pease, to Barnabas Pease at the time of the execution of the deed. Defendant claimed to have proven that in 1817, for the purpose of raising money by the indorsements of Barnabas Pease, he agreed to take from defendant a clear deed of the premises, in order to secure him on account of such indorsements, and to give defendant back a writing of even date with said deed to reconvey the premises to him whenever he (Barnabas Pease) should be free from all liabilities he might thus incur; that in pursuance of such agreement the deed and defeasance were executed and recorded; that the transaction was *bona fide*; * * * that Barnabas Pease, being freed from all liability, was bound to reconvey, and in so doing had done no more than a court of chancery would have compelled him to do. Plaintiff insisted that the deed was not *bona fide*, but was made to defraud the creditors of defendant. Barnabas Pease at the date of the deed was much in debt, and failed in four days afterward. On these facts the court charged the jury that if they should find the deed of 1817 was not executed in good faith, but with intent to defraud the creditors of Moses Pease, then they would find the deed in question to be without consideration and void, and their verdict must be for plaintiff.

The jury found for plaintiff. On appeal the court say: "The first question arises upon the correctness of the charge. And here it should be remarked, that it stands admitted on the motion, that the conveyance from Barnabas Pease to Moses Pease, the defendant, was entirely voluntarily. * * * The conveyance from the defendant to Barnabas Pease in 1817, being intended to defraud the creditors of the former, was void as to them, but good as between the parties. * * * Neither at law nor in chancery could Barnabas Pease be compelled to reconvey. As between the parties, the conveyance stood on the same ground as if a full and adequate consideration had been paid. Whether the conveyance was thus fraudulent was distinctly put to the jury, and they have answered the question. As against everybody then, but the creditors of his

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grantor, Barnabas Pease had a valid title." * * * The court then decides that the conveyance from Barnabas Pease to Moses Pease, being voluntary, was fraudulent and void as to the creditors of the former. (*Wise v. Tripp*, 13 Maine, 12; *Jackson v. Mather*, 7 Cow. 305; *Parkman v. Welch*, 19 Pick. 236.)

The proposed testimony was properly excluded. The sixth assignment is based upon the refusal of the court below to give the following instruction to the jury:

"If the jury believe from the evidence that the property in controversy prior to and at the time of the conveyance to Kerrin by defendant was hers, and that that conveyance was made without any consideration therefor, and that the same was not intended as a gift, and that afterward Young, at the request of Kerrin, did reconvey the property to defendant, the title so conveyed to defendant cannot be impeached or affected by the claims of plaintiff either as creditor of Kerrin or as a purchaser under the execution sale made upon the judgment against Kerrin, and the jury should find for defendant."

If the principles hereinbefore announced are correct, this instruction is clearly erroneous. It disregards the doctrine, established by an unbroken line of English and American decisions, that, as between the parties, a conveyance made with intent to hinder, delay or defraud creditors, gives to the grantee a perfect title, and that property so acquired is as much subject to the claims of the creditors of the grantee as any other property belonging to him. It disregards the whole question of fraudulent intent and notice on the part of appellant Kerrin, and Young. There are other reasons why this instruction should not have been given, but sufficient have been stated to justify the court below in refusing it.

The seventh assignment is the refusal of the court to give the following instruction to the jury: "If the jury believe from the evidence that at the time of the purchase made, and of the execution of the conveyance from Kerrin to Young, the latter paid the former, as a consideration therefor, the sum of twenty dollars in money, and delivered his

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notes, executed in negotiable form, to Kerrin for three thousand two hundred dollars, and that the purchase was made, and such conveyance so taken, and the consideration so paid, without any notice whatever on the part of Young, of any intent on the part of Kerrin, to hinder, delay, or defraud any creditor of his, and without any intent on the part of said Young to hinder, delay, or defraud any creditor of Kerrin, then the said Young was a *bona fide* purchaser of the property in question for a valuable consideration without notice, and the jury must find for the defendant."

The court refused to give the instruction as offered, and the defendant excepted. The court thereupon struck out the words, "and the jury must find for the defendant," by drawing a pen mark over them, and leaving the words still legible.

The instruction so changed was given to the jury. To the striking out of the words stated, and the giving of the instruction so changed, defendant excepted on the grounds that said words were necessary to the instruction as a guide for the jury, and that the instruction being given to the jury with the words so stricken out, but still legible, was calculated to mislead the jury, and left them at liberty, or induced them to find for plaintiff, though they should believe that Young was a *bona fide* purchaser for a valuable consideration without notice.

It is a well settled rule in equity, that a purchaser with notice himself, from a *bona fide* purchaser for a valuable consideration, who bought without notice, may protect himself under the first purchaser. (2 Foub. 149; 1 Story's Eq. Jur. 409; Gill. & Johns. 301.) The only exception to this rule is, where the estate becomes revested in the original party to the fraud, when the original equity will reattach to it in his hands. (1 Story's Eq. Jur., sec. 410.)

It is apparent from the evidence that appellant and Kerrin were the real actors in relation to the conveyance from appellant to Kerrin, from Kerrin to Young, and from Young to appellant. If Young purchased the property from Kerrin intending to pay for it, the record discloses the fact that he did not pay any portion of the purchase-money; that he

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paid twenty dollars, but that the money was first given to him for the purpose of being so “paid;” that the notes were never paid by him or any other person, but were given back to him. And yet the evidence is unmistakable that, technically, he did “pay” the twenty dollars and did “execute and deliver” said notes to Kerrin. Under the evidence, then, if this instruction had been given the jury would have been misled. As the instruction was offered, the jury must have concluded that Young did “pay” the twenty dollars, and did “execute and deliver” to Kerrin the two promissory notes, and they must have found for defendant. And yet, if Young did not, in fact, pay the twenty dollars, as he did not, if Kerrin first gave the money to him to be paid back, and if the notes were not paid to Kerrin, but returned to Young, then, as a result, the conveyance was voluntary. In that state of the case, if Kerrin was a fraudulent grantor the deed was valid, as to respondent, even if Young was an innocent donee or grantee. (*Swartz v. Hazlett*, 8 Cal. 126; 18 Wend. 397; *Lee v. Figg*, 37 Cal. 328.)

Hicks v. Stone et al. (13 Minn. 434), was an action to recover the value of a stock of goods, alleged to be the property of the plaintiff, and wrongfully taken by defendants, who justified by alleging that at the time, the goods were the property of La Dow & Isaacs, a firm composed of William La Dow and Samuel T. Isaacs, and that they were taken by the defendant Stone, then sheriff of the county, under certain attachments issued against the property of said firm, commenced against them by the other defendants. Plaintiff claimed under an alleged sale by La Dow & Isaacs to one James La Dow, and a sale by James La Dow to him. Defendants alleged these sales fraudulent and void as against the creditors of La Dow & Isaacs. Upon this question of fraud issue was joined. In rendering the decision on appeal by plaintiff, the court say: “It is said by the judge below that, admitting the original transfer of the goods to La Dow was fraudulent, there was no testimony that the plaintiff was a party to the fraud. We think there was testimony tending to show that plaintiff not only knew of the fraud, but participated in carrying it into effect.

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But, even if this were not so, as it appears that the plaintiff has never paid anything upon his alleged purchase from James La Dow, he is not entitled to protection as an innocent *bona fide* purchaser for value." (See also *Bolton v. Jacks*, 6 Rob. 234.)

Mr. Bump, under the head of "Voluntary Conveyances," says: "It follows from the definition of a voluntary conveyance that the question in regard to its validity or invalidity depends upon the intent of the party making it, and not on the motive with which it is received." * * * It is the innocent purchaser, and not the innocent donee, that is protected. The only question, therefore, is *quo animo* the gift or grant is made. It is the motive of the giver, and not the knowledge of the acceptor, that is to determine the validity of the transfer. (Bump, 279; see also 4 Sneed, 283; 18 Ill. 346; 32 Ill. 165; Willard's Eq. Jur. 256; 3 Clarke (Iowa), 557.)

In *Kaine v. Weigley* (22 Penn. 179), the court decide that "where the consideration money specified in a conveyance of real estate, made by an insolvent, was not paid at the time of the conveyance, it was the duty of the grantee, in an ejectment suit by one claiming as purchaser at a sheriff's sale subsequent to such conveyance, to show that such consideration money was afterward paid; that it was a full price for the property, and that the land was not purchased with an intent to hinder or defraud creditors." If the grantee has paid a valuable consideration, and has acted *bona fide*, without notice of the fraudulent intent of his grantor, he is protected, although his grantor conveyed with an intent to hinder, delay or defraud his creditors. In such case the innocent grantee not only acquires the legal title, but an equity that is paramount to the equity of creditors. But if he has, in fact, parted with no valuable thing, although entirely innocent, then if his grantor acts fraudulently, he is not protected. (*Spicer v. Waters*, 65 Barb. 227.) If Young had paid and Kerrin received the twenty dollars, and if Kerrin had received three thousand two hundred dollars named in the notes, then the instruction would have been correct. But in consideration of the evidence in the case,

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the instruction offered was incorrect, and should have been refused or modified so as not to mislead the jury. But the giving of the portion not stricken out without modification, was more favorable to appellant, under the evidence, than she was entitled to. Hence, she cannot complain.

In support of alleged error in striking out the words stated, and giving the instruction so changed, the case of *Gerhauser v. The North British and Mercantile Insurance Company* (6 Nev. 18), is cited, but the decision of the court in that case is not applicable to this. In that case the instruction offered was right, while, in this, under the evidence, it was radically wrong. In that case, if the jury found the facts stated in the instruction true, they should have found for defendant. In this, even though they had found the facts stated in the instruction true, still Young was not necessarily a *bona fide* purchaser for a valuable consideration without notice, and hence the jury should not have been instructed to find for defendant, even though they should find those facts true. Before they should have been so instructed, they should have been informed that they must find in addition, other facts necessary to make Young a *bona fide* purchaser for a valuable consideration without notice.

As to alleged error in giving the modified instruction with the rejected words still legible, it is only necessary to refer to *Gerhauser v. North British and Mercantile Company* (7 Nev. 193.) The court say: "The modification was made by passing through the words rejected, one stroke of the pen, leaving them still legible, and in that condition it was handed to the jury. If it was feared that this might mislead the jury, the attention of the court should have been called to the fact and a specific exception taken in case of refusal to allow the instruction to be rewritten or the rejected words to be obliterated." (See also in the same case, opinion on petition for rehearing, 199.)

It was the privilege of counsel for appellant to ask leave to rewrite the instruction or obliterate the rejected words. They could not expect the court to do either. Failing to do so, appellant cannot complain.

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The next and eighth assignment is the giving of an instruction to the jury which reads as follows:

“As against the plaintiff in this action, Hugh Kerrin could not divest himself of the title to the premises in this action, except by means of a conveyance to a *bona fide* purchaser for a valuable consideration without notice.”

If we are correct in the conclusions already arrived at, this instruction was clearly right. By the tenth assignment, appellant urges that the court erred in instructing the jury, that: “If the facts and circumstances proven and shown by the testimony in this action, afford a strong presumption that a fraud has been committed by Kerrin and defendant, against the rights of plaintiff, your verdict must be for plaintiff.”

This is objected to on the ground that it misstates the law, and is calculated to mislead the jury in this; that it, in effect, directs the jury to find a verdict for plaintiff, provided the facts and circumstances proven, afforded a strong presumption in their minds that any fraud whatever has been committed by Kerrin and defendant against the right of plaintiff, instead of limiting the instruction to a presumption of that kind of fraud, or such facts as the statute declares shall render a conveyance void against creditors. If the court had not otherwise instructed the jury upon the question of fraud and its effects, this instruction would seem open to appellant's objection that it might mislead the jury. But in addition to this, the court charged the jury as follows: “Our statute provides that every conveyance or assignment in writing, etc., of any estate or interest in lands, etc., made with the intent to hinder, delay or defraud creditors as against the persons hindered, delayed or defrauded, shall be void.” * * * “A person desiring to purchase, has a right to trust to the debtor's dominion over his property, and if he purchases in good faith for a valuable consideration, he should be protected in his purchase.” “The law vitiates all transfers made with the intent to hinder, delay or defraud creditors, but protects all interests which are conveyed in good consideration and *bona fide*.” “An inquiry into the validity of a transfer, under the statute, there-

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for involves three points: the existence of an intent to delay, hinder or defraud, the consideration and the *bona fides* of the transfer." If the jury believe from the evidence that the defendant made the purchase and took the conveyance from Young to her, and paid a valuable consideration therefor, without any notice of any intent on the part of Young to hinder, delay or defraud any creditor of Kerrin, then she is entitled to be protected as a *bona fide* purchaser for a valuable consideration without notice, and the jury should find for defendant."

We are of the opinion that under the instructions just quoted, as well as others, the jury must have known they should find for defendant, unless they found such fraud as under the statute makes a conveyance void as to creditors of the vendor.

"It is a rule of law * * * that in determining whether any given instruction or a portion of a charge be erroneous, or is calculated to mislead the jury, the whole must be taken together and considered as an entirety. * * * If, therefore, taken as an entirety, the charge or instructions fairly state the law, they must be sustained. (*Coples v. The Central Pacific Railroad*, 6 Nev. 274.)

The giving of the following instruction to the jury, appellant next assigns as error:

"If you believe from the evidence that the deed from Hugh Kerrin to Jacob Young, Jr., was made with the understanding that Young was to hold the property until such time as Kerrin desired, and that then it should be conveyed by Young as Kerrin should direct, and that such conveyance was intended to hinder and delay the creditors of Kerrin, and that the defendant knew of such understanding, and she further knew the fact before the conveyances were made to her by Young and Kerrin, on the fourth day of September, 1871, that Kerrin was indebted to plaintiff at the time, your verdict must be in favor of plaintiff." Appellant objects to this instruction, on the grounds that it ignores the alleged fact of Kerrin's holding the property in trust for defendant, and does not declare whether the understanding or the intent mentioned must be that of Kerrin

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and Young together, or need be that of Kerrin only. In other words, appellant claims if Young was a *bona fide* purchaser of the property from Kerrin for a valuable consideration without notice, that the transmission of the title through him to the defendant purged it of all consequences of fraud on the part of Kerrin, or knowledge on his part. We have already disposed of the question of trust. As to the remaining question, appellant is undoubtedly correct as a general legal proposition, if appellant was not a participant and actor with Kerrin in the fraud. But in our opinion the instruction does in fact state to the jury just what appellant claims it should. The instruction is: "If you believe, etc., that the deed from Kerrin to Young was made with the understanding," etc.

Webster defines "understanding" thus: "Intelligence between two or more persons; agreement of minds; union of sentiments. There is a good understanding between the minister and his people."

The jury, then, were instructed by the court that if they believed * * * that the deed from Kerrin to Young was made with the understanding, etc., that is, with the agreement of both Kerrin and Young, that then they should find for plaintiff. We are of the opinion that the jury understood the instruction as appellant assumes would be a correct declaration of the law, for such is its ordinary meaning. The next and last assignments are the giving to the jury these instructions, which can be considered together, the grounds of exception to each being the same.

"Eighth. If the jury believe from the evidence that the conveyance made by Kerrin to Young on the third of January, 1871, was made and executed for the purpose of hindering, delaying or defrauding the creditors of Kerrin in recovering the debt due by Kerrin to plaintiff, and that the defendant was aware that said conveyance was made for such purpose before the conveyances were made by Young and Kerrin, your verdict must be for plaintiff."

"Sixth. If you believe from the evidence that the consideration paid by Jacob Young, Jr., for the conveyance made by him to defendant was the delivery to him of the

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two promissory notes mentioned by the witnesses in this action and the twenty dollars mentioned by said witnesses, and that said defendant obtained such notes from Kerrin without paying a valuable consideration therefor, and that she knew that said conveyance from Kerrin to Young was made to hinder, delay or defraud the creditors of Kerrin, your verdict must be for plaintiff."

"Tenth. If you believe from the evidence that the only consideration paid by the defendant for the conveyance made to her by Young and Kerrin on the fourth day of September, 1871, were the two promissory notes and twenty dollars, testified to by the witnesses, and that no valuable consideration was paid by defendant to Kerrin for said (notes), and that prior to the time when said conveyances were made to her, she knew that the deed made on the third of January, 1871, by Kerrin to Young, was made with the intent to hinder, delay or defraud his creditors, your verdict must be for plaintiff."

Appellant objects to these instructions on the grounds that they directed a verdict for plaintiff, notwithstanding the fact might be that Kerrin received and held the property in trust, and notwithstanding the fact might be that Young was a *bona fide* purchaser of the property from Kerrin for a valuable consideration. The last objection only will be considered.

Instruction eighth charges the jury substantially in the language of the statute: jurors, like other men are presumed to know the law as construed by the courts. Such being the case, the jury could not have understood the court to instruct them to find for plaintiff, if they found Young was a *bona fide* purchaser for a valuable consideration paid by him, without notice, and if appellant was not a participant in Kerrin's fraud, for such is not the law. Besides, if appellant feared the jury were not cognizant of the construction placed upon the statute by the courts, proper instructions enlightening the jury should have been asked.

Instruction sixth charges the jury, substantially, that they must find for plaintiff if they should believe, from the evidence, that the consideration paid to Young was the

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two notes and the twenty dollars, and that defendant received such notes from Kerrin without paying a valuable consideration therefor, and she knew of Kerrin's fraudulent intent. In other words, the jury were charged to find for plaintiff if they found that the conveyance from Kerrin to Young was, in fact, without consideration; that Kerrin's conveyance was made with intent to hinder, delay or defraud creditors of Kerrin and appellant knew of such intent. The instruction was correct. The reasons for sustaining the instruction "sixth" are equally applicable to instruction "tenth."

The judgment of the court below is affirmed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.

APRIL TERM, 1877

[No. 751.]

A. P. LECHLER, RESPONDENT, *v.* SAMUEL A. CHAPIN,
APPELLANT.

TOWN SITE ACT CONSTRUED—ACT OF CONGRESS.—The act of congress was intended for the benefit and protection of the actual citizens of the town against those making claim to the land for purely speculative purposes.

IDEM—PARAMOUNT LAW.—The act of congress is the paramount law, and the legislature of this State cannot limit or extend the rights of claimants, or dispose of the trust in any other manner than is prescribed by the act of congress.

IDEM—WHEN PROOFS SHOULD BE MADE. —There is nothing in the act of congress which limits the proof upon the part of claimants to their interest in the land at the time of entry thereof in the land-office. If the land at that time is vacant, it is subject to location and occupancy by any person at any time prior to the issuance of a patent.

IDEM—UNOCCUPIED LANDS.—It was not the intention of congress, nor of the legislature of this State, that the unoccupied lands within the town site at the time of the entry should become the property of the citizens of the town.

IDEM—ACTUAL OCCUPANTS ONLY ENTITLED TO DEED.—To entitle an applicant to a deed, he must be an actual occupant, or entitled to the occupancy of the land.

ACTUAL POSSESSION.—*Eureka M. & S. Co. v. Way*, 11 Nev. 171, as to what constitutes actual possession, followed and approved.

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ABANDONMENT OF POSSESSORY TITLE.--If a party abandons the land, or fails to keep his title good and leaves it vacant and unoccupied, he cannot strengthen his claim to the land by any act committed by him after the actual occupancy of the premises by another person.

APPEAL from the District Court of the Third Judicial District, Lyon County.

The facts appear in the opinion.

Ellis & King, for Appellant:

I. The court erred in overruling the demurrer. Our statute laws of 1867, p. 175, and 1869, p. 68, sec. 2, deals only with the rights of claimants to town property as they existed at the date of the entry of the lands by the proper authorities. The date of *entry* is the precise point of time at which the rights of the occupants of a town-site become fixed, at law and in equity.

After the right to enter the lands for the benefit of the occupants is once established (*a fortiori* after the actual entry and payment therefor), it would be unjust to permit any interference therewith by those who may come afterwards, whether the lands are all to be divided among those occupying them, according to their respective interests or claims, or a part belongs to the town at large; for in the one case the trespass is upon the individual occupant, and in the other repose the rights of the whole body of the inhabitants of the town. (See *Castner v. Gunther*, 6 Min. 119.)

R. H. Taylor, for Respondent.
No brief on file.

By the Court, HAWLEY, C. J.:

On the thirtieth day of November, A.D. 1867, the district judge of Lyon county, acting under and in pursuance of the act of congress, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867, entered in the land-office at Carson city, Nevada, the land embracing the town-site of Silver city, "in trust for the several use and benefit of the occupants thereof, according to their respective interests." (14

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U. S. Stat. 541.) On the twentieth day of September, A.D. 1873, the government of the United States issued and delivered to the district judge of said county a patent for said land. The district judge thereafter gave due and proper notice of the issuance of said patent, in conformity with the provisions of the act of the legislature of this State, entitled "An act prescribing rules and regulations for the execution of the trust" arising under said act of congress, approved February 20, 1869 (Stat. 1869, 68), and the act amendatory thereof, approved March 8, 1871. (Stat. 1871, 163.)

The plaintiff and defendant, within the time prescribed by said acts, each filed a statement in writing, claiming the land in controversy in this suit, and the district judge, in pursuance of the provisions of section 5 of the act of 1869, certified the papers and proceedings relating to the adverse claim of the respective parties to the district court of Lyon county.

The land in controversy is the east fifty feet of lots number 1, 4, 5, 8 and 9, in block number 18 of the town survey of Silver city, being fifty feet in width and two hundred feet in length.

The plaintiff in his complaint, after stating these facts, among other things, alleged: That on or about the fifteenth day of November, A.D. 1870, one W. H. Douglass, a citizen of the United States, and an inhabitant of said Silver city, went upon, took up, located, occupied and improved the land which was then unoccupied and vacant public land of the United States, and continued to occupy and possess the same until the twelfth day of April, A.D. 1871, when he conveyed the same, by deed, to C. D. McDuffie, W. E. Dunbar and D. L. Hastings; that on or about the twentieth day of January, A.D. 1873, the said C. D. McDuffie, W. E. Dunbar and D. L. Hastings, conveyed the said land and premises to the plaintiff; that from the said fifteenth day of November, A.D. 1870, the plaintiff and his grantors and predecessors have been rightfully in the occupancy and possession of said land; that plaintiff is now rightfully entitled to the possession of said land and to receive a deed for the same from the district judge; that said defendant has never

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occupied, possessed, or improved said land, or any part thereof, and is not entitled to the possession of the same, or any part thereof, nor to a deed therefor. To this complaint the defendant interposed a demurrer upon the ground that it "does not state facts sufficient to constitute a cause of action." This demurrer was overruled, and the defendant filed an answer denying plaintiff's possession of the land, and asserting title in himself.

Upon the trial the plaintiff proved his claim substantially as alleged in his complaint. In 1870, when Douglas entered upon the land, he set stakes at the corners of the land and built a house upon the ground in controversy, and resided therein with his family until the time of the conveyance to McDuffie *et al.* The plaintiff, ever since the twentieth day of January, A. D. 1873, has resided upon said premises and used and occupied the same as a family residence. The defendant claimed a deed to the whole of block 18, and the proofs offered by him in support thereof established the following facts, viz: That on the fourteenth day of January, A. D. 1861, one Cyrus S. Kellogg, who is not shown to have had any interest in the land, conveyed the whole of block 18, to the defendant, as agent of, and in trust for the Carson River Gold and Silver Mining company; that during the year A. D. 1861, the defendant set posts at a distance of eighteen feet apart, around the whole of said block, with the exception of three lots on the northwest corner; that some of the posts remained upon the ground for two or three years but most of them were removed in a very short time and used as firewood; that in 1865 one William H. Pride, acting for the defendant, built and occupied a board cabin, twelve by eighteen feet in size, upon a part of block 18, and cut a ditch, one foot wide and one foot deep, around the whole block, except lots 2, 3 and 6, which ditch soon filled up with sand; that, in consideration of this work, the defendant conveyed to said Pride one lot in said block; that on the eighth day of March, A. D. 1865, the defendant leased the whole block to Pride for the period of one year; that Pride afterward sold and conveyed his interest in the lot to one J. F. Graham, who conveyed it

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to defendant in 1873. Pride is not shown to have resided on the land at any time except in the year 1865, and for what length of time during that year does not appear. In August, 1870, the defendant moved to San Francisco, where he has ever since resided. There was no attempt upon the part of defendant to prove any occupancy of the land by himself or any of his grantors or predecessors in interest after the year 1865, or to prove any facts tending to show any acts of dominion or control over the premises, or any part thereof, until the year 1873, long after the entry of plaintiff's grantors, and while plaintiff was in the actual occupation of the ground in controversy in this suit, when the defendant caused one string of wire to be stretched around block 18, which wire was immediately removed by the plaintiff. Some slight vestiges of the posts placed on the ground in 1861 and slight traces of the ditch dug in 1865 were found at the time of trial. The ground is quite sandy and is valuable only for the purpose of a town lot.

With these facts in evidence the court, among other things not objected to, charged the jury as follows:

“First. The statute under which this action is instituted is to the effect that no one is entitled to the benefit of its provisions unless he is an actual occupant. Actual occupation is absolutely necessary in order to confer any right to a lot of land within the town-site;

“Second. The mere planting of posts around a lot of land and placing a wire around them, or digging a shallow ditch around it, not sufficient to constitute an inclosure, without a residence upon the lot or placing it to some useful purpose, do not constitute an actual occupation;

“Third. If the jury should believe from the evidence that the plaintiff entered upon the lot of land in controversy in this action, and that at the time of such entry such lot of land was unoccupied and vacant, and that the plaintiff, since such entry, has occupied such lot of land as his residence, then the jury should find for the plaintiff;

“Fourth. If the jury should believe, from the evidence, that the defendant was the first occupant of the lot of land,

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and that while the defendant was such occupant that the plaintiff entered upon the lot and ousted the defendant therefrom, then the jury should find a verdict in favor of the defendant."

Under these instructions the jury found a verdict in favor of the plaintiff. The defendant then moved for a new trial, which was refused, and this appeal is taken by defendant from the order of court overruling his motion for a new trial and from the judgment of the court awarding the land to the plaintiff. The first and most important question presented for our decision is whether or not the court erred in overruling the demurrer to plaintiff's complaint. It is argued by appellant that inasmuch as the claim of plaintiff to the land in controversy is subsequent to the date of the entry of the land in the land-office for a town site, that he could not assert or claim any right to the land under the provisions of the law of this state which makes it the duty of the district judge holding the title to convey the same "to the person or persons who shall have, possess or be entitled to the right of possession or occupancy thereof, according to his, her or their several and respective right or interest in the same, as they existed in law or equity at the time of the entry of such lands." (Stat. of 1869, p. 68, sec. 2.)

Ordinarily, the rights of the parties under the law relates back to the time of the entry of the land, and their rights are to be determined as they existed at that date, and there can be no doubt that if the defendant in this case, at the time of the entry of the land by the district judge, was an "actual occupant" of the land within the meaning of that term as used in the act of congress, he would, as against the claim of plaintiff, have been entitled to a deed, unless he had abandoned his interest prior to the time when Douglas took up and claimed the lots in dispute. It was held in *Leech v. Ranch* (3 Min. 454), that when the proper proofs are made in the land-office the occupants of the town site acquire certain vested rights, and are *eo instanti* entitled to the benefits of the land, and this decision was followed in the case of *Castner v. Gunther* (6 Min. 119.) In both of

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these cases cited and relied upon by appellant in support of his position, it was decided that the occupant of the land at the time the proofs were made, having fully complied with all the provisions of the law, was entitled to the lots in controversy, as against subsequent occupants having no superior equity. This principle will not be denied. But the facts in this case and the principle of law involved are, in many essential features, different from the case cited.

Here the only question presented by the demurrer is, whether a party who enters upon, locates and becomes an actual occupant of vacant and unoccupied lots of land within the limits of a town-site, after the entry of such town-site in the land-office, and before the issuance of a patent by the government of the United States, is entitled to a deed under the provisions of the act of congress.

In the consideration of this question we must not lose sight of the fact that the act of congress was intended for the benefit and protection of the actual citizens of the town against those making claim to the land for purely speculative purposes. (*Matter of Selby*, 6 Mich. 193; *Winfield Town Company v. Maris*, 11 Kan. 128; *Jones v. City of Petaluma*, 38 Cal. 397; *Aleman v. City of Petaluma*, 38 Cal. 554.)

It must also be remembered that the act of congress is the paramount law, and that the legislature of this state, in prescribing the rules and regulations for the execution of the trust arising under said act of congress, cannot limit or extend the rights of claimants, or dispose of the trust in any other manner than is prescribed by the act of congress; and, if there is any provision to that effect in the statute of this state, it is clearly inoperative and void. (*Winfield Town Company v. Maris*, *supra*.)

There is nothing in the act of congress which limits the proof upon the part of the respective claimants to their interest in the land as it existed at the time of the entry. We are of opinion that if the land in controversy in this suit was at that time vacant and unoccupied, as alleged in plaintiff's complaint, it was subject to location and occupancy by any person at any time prior to the issuance of a patent. Until the patent issues the government does not

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part with its title. It seems to us quite clear that it was not the intention of congress, nor of the legislature of this state, that the unoccupied lands within the town-site at the time of the entry by the judge should become the property of the citizens of the town. Section 8 of the act of the legislature of this state only provides for the public sale of such lots as are not legally conveyed to the proper owners before the expiration of one year after the same shall be passed upon by the judge; or, in case of contest, within thirty days after such contest is finally determined, and all lots that have not been conveyed shall then be sold to the highest bidder and the proceeds applied as provided for in said section.

From this construction of the law it follows that the court did not err in overruling the demurrer to plaintiff's complaint.

Instructions one and two as given by the court are not erroneous. This court has twice decided that to entitle an applicant under the law of congress, or of this state, to a deed, he must be an actual occupant or entitled to the occupancy of the land. (*Treadway v. Wilder*, 8 Nev. 98; 9 Nev. 67.)

The land department of the government, in its rulings, declares that the only beneficiaries of the trust, under the town-site law, are the occupants of the town. (1 Lester, Land Laws, 435.) The several courts wherein this question has been presented have uniformly announced the same doctrine. (*Leech v. Ranch*, 3 Min., 451; *Carson v. Smith*, 12 Min., 560; *Cash v. Spalding*, 6 Mich., 213; *Winfield Town Company v. Maris*, 11 Kan., 148; *Sherry v. Sampson*, 11 Kan., 615.)

These decisions were nearly all rendered under the act of congress, approved May 23, 1844 (5 U. S. Stat. 657), but the provisions of the act of 1867, in so far as this question is concerned, are identical with the provisions of the act of 1844.

To be an occupant, the party must have the actual use or possession of the land. The acts necessary to constitute possession must, in a great measure, always depend upon

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the character of the land, the locality and object for which it is taken up. But in all cases where a party relies solely upon possession, there must be a subjection of the land to the will and control of the claimant. The occupant must assert an exclusive ownership over the land, and his acts must at all times be in harmony with his title. His possession must, in the language of the authorities, be apparent, open, notorious, unequivocal, *pedis possessio*, carrying with it the evidences and marks of ownership. (*Eureka Mining and Smelling Company v. Way*, 11 Nev. 171, and authorities there cited.)

The second instruction is inartificially drawn, and contains matters which, under the proofs, were not strictly at issue in this case; but it is evident that the jury were not misled thereby to the prejudice of the defendant. There was no proof tending to show that the defendant ever stretched a wire around any portion of block 18, until long after the rights of plaintiff were acquired. Conceding it to be true that defendant by placing posts around the block in 1861, and digging a ditch around it and building a cabin on one corner of it in 1865, had planted a germ which might expand and open into a title; or, for argument sake, conceding that in the year 1865, during the occupancy of Pride, that defendant's title was good as against every one, except the government of the United States. Yet it must, as we think, be admitted that if the defendant failed to do such acts as were necessary to complete and perfect his title, or failed to keep his title good by keeping actual possession of the land, and that if the land was abandoned by him, or left vacant and unoccupied prior to the entry of plaintiff, then it certainly follows that defendant could not strengthen his claim to the land by any acts committed by him after the actual occupancy of the premises by plaintiff and his grantors.

The third and fourth instructions given by the court clearly and correctly state the rule of law applicable to the particular facts of this case.

The court did not err in overruling defendant's motion for a new trial. At the time Douglas entered upon and took

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up the lots in controversy they were not, as testified to by him, claimed by any person, nor did any person at any time during his occupancy assert any claim to the land.

After the year 1865, the defendant did not, nor did any one in his behalf, reside upon the land. He did not cultivate it; he did not inclose it; he did not use it for any purpose whatever. In short, he did not exercise any acts of dominion or control over the land until 1873, after the plaintiff's rights had been acquired. Under these circumstances the rights which defendant had to the land in controversy in 1865 were lost by his failure to keep his claim good, and thereafter any person had the right to enter upon and take possession of said land and become an actual occupant thereof.

From the evidence in this case we are satisfied that at the time of the issuance of the patent by the United States the plaintiff's right to the possession of the land was superior to the claim of the defendant, and that the verdict of the jury was right.

The judgment of the district court is affirmed.

BEATTY, J., concurring:

The law under which this controversy is conducted (Stat. 1869, p. 68; Stat. 1871, p. 123) requires the town-site trustee to give public notice of the receipt of the patent, and provides that all claims to town lots which are not presented within six months after the first publication of such notice shall be forever barred. It does not require or authorize the trustee to take or to demand any proofs of the validity of the claims presented, but seems to contemplate that, except in case of adverse claims to the same lot or parcel of land, he shall at the expiration of the time for filing claims, as a matter of course, convey to all persons the lots or parcels claimed by them respectively.

In case of a contest, provision is made for litigating the adverse claims in the courts, and when the case is finally decided, the result is to be certified to the trustee, who is required to convey the title to the prevailing party.

It seems to me impossible to reconcile these provisions

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of the law with the theory of the appellant that it was the intention of the Nevada legislature to confine the right of pre-emption to those who were occupants within the town-site at the date of the entry. It is true the language quoted in the opinion of the court, from section 2 of the act, taken by itself, does warrant that construction. But that language, so construed, is repugnant to the provisions above referred to, prescribing rules for the guidance of the trustee. If it had been intended to confine the right of pre-emption to those who were occupants at the date of the entry, surely some provision would have been made for the taking of proofs of such occupancy by the trustees in uncontested cases, and it would not have been assumed, as it seems to have been, that, in all contested cases, some one of the contestants must necessarily prevail and thereby become entitled to a conveyance from the trustees. Under the law as it stands, all that is required of the claimant of any lot is that he shall, within six months of the first publication of a notice of the receipt of the patent, sign a statement in writing containing a correct description of the particular parcel or parcels which he claims to be entitled to receive, and deliver the same to the trustee. If his claim is not contested within the time allowed for filing claims, there is no provision for any other proceedings whatever, and it follows necessarily that the trustee must make deeds, as a matter of course, in uncontested cases, or else that he may arbitrarily demand proofs and compel claimants who have fulfilled every requirement of the statute to resort to the courts for the means of compelling him to act. I cannot believe that the legislature intended to invest the trustee with any such arbitrary discretion. On the contrary, the whole idea of the law seems to have been this: All claimants must file their applications within a certain time. Those which are not filed within a certain time shall be forever barred. Consequently, in cases where there is no contest, as no one but the claimant is interested in the matter, he ought to have his deed without further trouble or expense; and in cases where there is a contest, as no one is interested in the matter except the contestants, that one who shows the best

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right, as among themselves, to the occupancy of the premises, should prevail and get his deed. This conclusion is inevitable, if I have correctly apprehended the provisions of the law with respect to contests between adverse claimants; for no such contingency as a failure on the part of all the claimants appears to have been contemplated, although it is obvious that, of several claimants of the same parcel, no one of them might be able to prove an occupancy by himself or his predecessors at the date of the entry.

This very case affords a striking illustration of the absurd results which would follow from the construction of the law contended for by the appellant. The respondent, by his grantors and predecessors, was in possession of the lot in controversy long before the issuance of the patent, but not at the date of the entry of the town site. The appellant had occupied, but, according to the proof, had abandoned, the premises long before the entry. There is no possible construction of the laws of congress or of this state under which he would be entitled to a deed, and yet if his position is tenable the respondent cannot prevail in the contest, and, because the respondent cannot prevail, he must. This result is brought about in the following manner: The respondent, being the actual present occupant of the disputed premises, was naturally the first to apply for a deed. The appellant subsequently filed his adverse claim. Under the statute the contest was transferred to the district court, and there, by express provision of the law, the first claimant was plaintiff, the second claimant defendant. The plaintiff filed a complaint setting out the particulars of his claim, and the defendant demurred. If his construction of the law is correct, his demurrer should have been sustained, and, as the plaintiff could not have amended, there would have been nothing for the court to do except to give judgment for the defendant and certify the result to the trustee, who, under the law, must have given him a deed, although he had not shown, and never could have shown, any right to it whatever. This, it seems to me, is a complete *reductio ad absurdum*. It never could have been intended that a contestant without the shadow of a claim to a lot, should

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obtain a deed for it, merely because the occupant and first applicant for a deed could not plead or prove an occupancy antedating the entry. There is, in my opinion, no other sensible construction of the law than that above indicated: that, when there is but one claim filed within the time allowed for that purpose, as all other claims are forever barred, the claimant who has filed his application shall receive his deed, as a matter of course, and when more than one claim has been filed, the courts to which the contest is transferred have only to try the right of occupancy as between the contestants. By the terms of the law, all other rights are barred by the failure to file claims in time, and as there is no right anywhere superior to that of the contestants, it is only reasonable that the most meritorious of them should prevail.

To reconcile the language of section 2 of the act to this view of its general scope and intent, it is only necessary to suppose that that language is to be limited in its application to cases in which there was an occupation at the date of the entry, and that it does not apply to cases in which the land was vacant and unoccupied at that date.

It will be seen that I have thus far confined myself to a discussion of the state law, without referring to the terms or the construction of the act of congress. I have done so for the reason that the appellant bases his argument exclusively upon the provisions of the state law, and because, as above stated, there is no possible construction of the law of congress under which he could have claimed the right to a deed from the trustee. But the law of congress is undoubtedly the paramount law, and must be allowed a controlling force so far as its provisions extend. It allows the entry and purchase of town-sites in trust for the "occupants." The word "occupants" as used in the act of congress must have some definite meaning, and it is of great practical importance whether it shall be construed to include those only who were occupying at the date of the entry, or to extend to those who commenced occupying at any time thereafter. In the opinion of the court, and of the district judge, it includes all who occupy before the issuance of the patent.

Points decided.

This conclusion, however, is opposed to the decision in the Minnesota cases referred to in the opinion of the court and to the intimations of opinion contained in the Michigan and Kansas cases. The result of those cases seems to be that the rights of occupants of town-sites all relate to the date of the entry; that all parcels of land occupied at that date must go to the occupants, their heirs and assigns, and that the unoccupied parcels within the town-site at the date of the entry belong to the town, as a community. To my mind neither of these opposing views is perfectly satisfactory, and, as it appears to me to be unnecessary to decide the question in order to reach a conclusion in this case, I prefer, so far as I am concerned, to leave it undecided until a case arises in which it is necessarily involved. For the purposes of this case it is sufficient to say that, under the state law, the plaintiff was entitled to prevail. The defendant had no rights under the law of congress; and, if the town community or any other person had or have any rights under that law superior to those of the plaintiff, they are not in question here and are not concluded by the decision in favor of the plaintiff. If the result is to give him a deed for a lot that belongs to the community of Silver city, the defendant at least has no right to complain.

For these reasons I concur in affirming the judgment.

[No. 782.]

GEORGE S. ELDER ET AL., APPELLANTS, v. JAMES R. SHAW; RESPONDENT.

STATEMENT ON MOTION FOR NEW TRIAL—INSUFFICIENCY OF EVIDENCE.—An assignment of error upon the ground of insufficiency of evidence to justify the findings and judgment will be disregarded, unless it specifies the particulars in which such evidence is alleged to be insufficient.

EQUITY WHEN NOT THE PROPER REMEDY.—A suit in equity to enjoin the assignment of an undertaking on attachment, or the commencement of an action thereon, upon the ground that said undertaking is void *ab initio*, will not be maintained, as the parties, in the event of a suit upon the undertaking, would have a complete remedy at law.

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APPEAL from the District Court of the Third Judicial District, Lyon County.

The facts appear in the opinion.

T. W. W. Davies and Thomas Wells, for Appellants:

I. The attachment was fraudulently procured, and was void *ab initio*. The bond given to release it cannot be enforced at law. (Drake on Attachment, secs. 416, 173 *a*, 274 *et seq.*; *Drummond v. Stewart*, 8 Iowa, 341.)

II. Unless enjoined, the bond may be assigned to an innocent purchaser. (3 Daniel Ch. Pr. 1726, 1755, and 1756; Hilliard on Judgments, 291 *et seq.*)

III. The district court had full power, under the well established rules of equity jurisprudence, to enjoin the enforcement of this bond. (3 Daniel's Ch. Pl. & Pr. 1755-56; 2 Story's Eq. Jur., secs. 953, 906-7; *Osborn v. U. S. Bank*, 9 Wheaton, 738; Eden on Inj., 2 Ames's Ed. 341-45; *Darst v. Brockway*, 11 Ohio, 462; *Atlantic De Laine Co. v. Tredick*, 5 R. I. 171; 2 Nev. 154; 7 Barb. 253; 1 Denio, 184; 9 Ark. 159; 7 La. 668; 5 Ark. 457; 14 La. 82; Drake on Attachment, sec. 317.)

John Powell, Jr., for Respondent:

I. The plaintiff has a speedy and adequate remedy by an ordinary action at law, and a court of equity will not interpose to enjoin the proceedings. (4 Cal. 177; 7 Cal. 276; 30 Cal. 325; 32 Cal. 265; *Hamer v. Kane*, 7 Nev. 612; *Connery v. Swift*, 9 Nev. 39.)

By the Court, LEONARD, J.:

On the thirtieth of November, 1874, respondent Shaw commenced an action in the justice court, Silver City township, Lyon county, in this state, against one J. B. Laws, to recover one hundred and thirty dollars, alleged to be due for feeding stock. An attachment was demanded and regularly issued, so far as appears on the face of the papers; eight horses and a wood wagon were attached as the property of defendant, Laws, by the constable of said township. For the purpose of obtaining a release of the prop-

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erty, the plaintiffs in this suit executed and delivered to the constable the following document, to wit:

“Justice Court, Silver City Township, Lyon County, Nevada. *J. R. Shaw v. J. B. Laws*, undertaking on release of property—Whereas, there has been an attachment levied this day on eight horses and one wagon belonging to the above defendant, by one Sanford Spaulding, constable of Silver City township, Lyon county, Nevada, we, the undersigned, do undertake on the part of said defendant, that the said horses shall be forthcoming when called for by any court having jurisdiction over the above entitled action, together with one wood-wagon, and in default thereof we will pay all damages which the plaintiff may sustain thereby.

“Witness our hands and seals, this thirtieth day of November, 1874.

“GEO. S. ELDER, [L. S.]

“C. BECKER, [L. S.]”

This document was accepted by the constable and the property released from attachment. A jury trial was had in the justices' court and a verdict rendered for defendant Laws. Thereupon judgment for costs was entered against plaintiff Shaw, who appealed to the district court, where a jury trial was waived, and the findings and judgment of the court were for plaintiff. At both trials defendant pleaded, and claimed to have proven, that the demand upon which the action was brought had been fully paid by a conveyance of certain real property from one Jones to the plaintiff Shaw. The said conveyance was, on its face, an absolute deed, and the consideration named was three hundred and eighty dollars gold coin. At each trial plaintiff claimed that the conveyance, when executed, was intended as a mortgage, and the real issue was, whether the deed was in fact absolute, and that, as a consequence, the debt sued on was extinguished, or, by the intention of the parties, a mortgage. From the somewhat conflicting testimony, the appellate court found the latter to be the fact, and rendered judgment for plaintiff for one hundred and thirty dollars and costs. Subsequently these plaintiffs brought this suit in the said district court

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for the purpose of enjoining defendant herein from assigning said document or instituting any action thereon against plaintiffs or either of them, and for judgment declaring the same null and void and that it be canceled.

On the trial, at the conclusion of plaintiff's proofs, defendant, by his counsel, moved for a nonsuit upon various grounds. The motion was taken under advisement by the court and defendant introduced his evidence. When the proofs were all in, the court granted the motion for nonsuit, and rendered judgment in favor of defendant for his costs. Plaintiffs duly excepted.

Plaintiffs moved for a new trial on the following grounds: "First. On the ground of insufficiency of evidence to justify the findings and judgment of the court, and because the same is against law; Second. Errors in law, which occurred at the trial, then and there excepted to by plaintiffs."

The first assignment will be disregarded, inasmuch as the statement does not "specify the particulars in which such evidence is alleged to be insufficient."

Under the last assignment the particular error stated as the one upon which plaintiffs will rely, is the granting of the motion for a nonsuit, then and there duly excepted to by plaintiffs, the assigned error being thus stated: "That the findings, decision and judgment of the court are against law in this: That it was shown on the trial that the undertaking in question was obtained by the wrongful and fraudulent affidavit of the defendant in his suit against Laws, set forth in the bill in this cause."

It plainly appears from the statement in this case that the deed from Jones to Shaw was intended as a mortgage, and that it was given and accepted, in part, to secure the payment of the said sum of one hundred and thirty dollars due from Laws to Shaw.

The debt having been secured by a mortgage, appellants claim that under the statute the writ of attachment was improperly issued; that the bond in question was void *ab initio*, and that it could not be enforced in an action at law. So, too, it was held by the court below. If this be true, then certainly there was no occasion for a suit in equity, for

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in any event appellants would then have a perfect and adequate defense in an action at law. If respondent should sue, counsel for appellants say they would have a good defense at law; but they intimated in the argument, that if the document in question should be assigned to an innocent purchaser without notice, then appellants might not be able, successfully, to interpose their defense. But such is not the case. To an action brought upon such a chose in action as the one in question, appellants' defense would be as complete, in case they were sued by an assignee, as it would be if the suit was brought by respondent. (Sec 5, Civ. Prac. Act.)

In any event, then, should an action be instituted upon the document in question, appellants would have all the means of defense to which they are entitled. In other words, they would have a complete remedy at law. If the instrument is void or voidable, as claimed by appellants, should the necessity arise, they could avail themselves of such plea and defense.

Equity will interpose only when the remedy at law is not adequate or complete. (*Butler et al. v. Durham*, 2 Ga. 413; *Hamer v. Kane*, 7 Nev. 63.) Besides, although respondent's insolvency and his inability to respond in damages are alleged in the bill, yet these allegations are fully denied in the answer, and there was no proof to sustain either.

We are of the opinion that the court below did not abuse its sound discretion, and the judgment of nonsuit is affirmed.

Argument for Appellant.

[No. 800.]

CHARLES THUNDER, RESPONDENT, v. ROBERT E.
BROWN, APPELLANT.

QUESTIONS ASKED WITNESS TO REFRESH HIS MEMORY—DISCRETION OF COURT.

—In a suit upon a lost note, after defendant had introduced evidence to show that plaintiff in making inquiries of his friends for the lost papers never mentioned the note, plaintiff's counsel in rebuttal was allowed to ask this question: "In order to call your attention to the fact whether or not he (plaintiff) mentioned the loss of the note, I now ask you what reply you made to him?" *Held*, that the court did not abuse its discretion in allowing the question for the purpose offered.

IDEM—ANSWER OF WITNESS—WHEN PREJUDICIAL.—The witness answered:

"I remember what I said: If you have lost those papers Brown will never pay you:" *Held*, inadmissible as evidence for the reason that it was a direct attack upon the character of the defendant when his character for honesty had not been put in issue.

IDEM.—When an answer is given prejudicial to a party that is not responsive to the question asked, he must move the court to strike it out, or he cannot in the appellate court complain of the answer given by the witness.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion of the court.

Thomas Wren and Crittenden Thornton, for Appellant:

I. The question asked of the witness McCullough was improper. Whatever McCullough said to the plaintiff was not a declaration by which the defendant could have been bound. The defendant was not present at the conversation. He did not admit the truth of his answer, either by silence or express assent.

McCullough was not the loser of the note nor the finder. He was not present when it was lost or found. How then, under any circumstances, can his remark be deemed a part of the *res gestæ*, or a declaration which could bind the defendant? The answer was as objectionable as the question, and on precisely the same grounds. It was directly responsive to the question.

II. The answer of McCullough was an attack upon the character of a witness in, and party to, a civil case. Such evidence is only admissible in cases in which the cause of

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action involves the moral or legal turpitude of the party. (1 Greenl. Ev., sec. 54, and cases cited; 1 Phillip's Ev., 757, and notes; *Fowler v. Aetna F. In. Co.*, 6 Conn. 673; *Pratt v. Andrews*, 4 Const. 493; *Thompson v. Bowie*, 4 Wall. (N. Y.) 471.)

III. The court cannot infer that the verdict would have been the same if the erroneous testimony had not been admitted. (*Spanagel v. Dellinger*, 34 Cal. 476; *Osgood v. Manhattan Co.*, 3 Cow. 612; *Marquand v. Webb*, 16 John. 89; *Sweeny v. Reilly*, 42 Cal. 407; *Rice v. Heath*, 39 Cal. 612; *Leonard v. Kingsley*, 50 Cal. 630.)

John T. Baker, for Respondent:

The question asked McCullough was proper under the circumstances of this case. But if there was any error, it could not have prejudiced the defendant's case, as, leaving out the testimony of the witness McCullough there was a fair preponderance of testimony in favor of the plaintiff. All the testimony shows that the verdict was clearly right, and it should not be disturbed, because there is sufficient evidence, without that which is complained of to justify the verdict. (*Robbins v. Lincoln*, 12 Wis. 1.)

By the Court, HAWLEY, C. J.:

This is an action upon a promissory note, executed by defendant Brown, for the sum of one thousand three hundred dollars, in payment of the purchase-price of a one-half interest in a team of ten animals and two wagons, bought from plaintiff Thunder.

The note was payable on the first day of January, A. D. 1875. It is alleged in the complaint that the note was lost, and that there is a balance due, and unpaid thereon, of nine hundred and ninety-nine dollars.

The answer admits the execution of the note and the purpose for which it was given; denies that it was lost by plaintiff, and alleges that, in the early part of June, 1875, the defendant paid the note in full, took it up, and destroyed it.

Upon the trial plaintiff testified that the note was lost in

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the early part of the month of June, A. D. 1875. The evidence offered by the respective parties, as to the loss and payment of the note was conflicting.

In the course of the trial the defendant, for the purpose of disproving the loss of the note, offered in evidence an advertisement which the plaintiff caused to be published in the *Eureka Sentinel* on the seventeenth day of June, A. D. 1875, to the effect that plaintiff had lost a certain bill of sale for a team of ten animals and certain receipts for coal. No mention was made of the promissory note which plaintiff testified he had lost at the same time. It is stated in the brief of counsel for appellant that testimony was also introduced by the defendant tending to prove that the plaintiff, in making inquiries of his friends and acquaintance for the lost papers, never mentioned the note.

In rebuttal of this testimony, the plaintiff called as a witness one G. K. McCullough, who testified that plaintiff came to him in the month of June, 1875, and stated that he had been on a spree and had lost all his papers against Brown for the sale of the team, but did not mention any particular papers.

Plaintiff's counsel then asked the witness this question: "In order to call your attention to the fact whether or not he mentioned the loss of a note, I now ask you what reply you made to him?" Counsel for the defendant objected to the question, "on the grounds of incompetency, irrelevancy and immateriality." The objection was overruled and defendant excepted to the ruling of the court. The witness answered the question as follows: "I remember what I said: 'If you have lost those papers, Brown will never pay you.' I am of the impression that he mentioned the note, but I am not sure."

The jury found a verdict for plaintiff. Defendant moved the court for a new trial; hence this appeal.

The only error assigned and relied upon by appellant is the ruling of the court upon the objections made to the questions asked of the witness McCullough. The question was asked simply for the purpose of refreshing the memory of the witness as to whether or not the plaintiff at such con-

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versation had mentioned the loss of the note. The defendant seems to have conceded at the trial, and does not here deny, that it was proper for plaintiff, in rebuttal of the testimony offered by defendant, to show, if he could, that he had mentioned the loss of the note to his friends and acquaintance.

Under these circumstances we are of the opinion that the question was one which the court, without exceeding the reasonable limits of its discretion, had the right to allow for the sole purpose of refreshing the memory of the witness, although, in our judgment, it would have been much better for the court to have compelled counsel to so shape his question as not to call for a direct answer as to what the witness said.

The expression of the witness, "If you have lost those papers, Brown will never pay you," was inadmissible as evidence, for the reason, as claimed by appellant, that it was a direct attack upon the character of the defendant, when his character for honesty had not been put in issue. But the question as asked did not necessarily call for an answer reflecting in any manner upon the general character of the defendant. It was impossible for the court to know, in advance, what the answer of the witness would be. The court was only called upon to determine whether the question was admissible for the purpose for which it was offered. When the answer was given, tending to prejudice the defendant before the jury, his counsel ought to have moved the court to strike it out. Not having done so, he is not in a position to complain of the answer given by the witness. (*Gaudette v. Travis*, 11 Nev. 149; *Roberts v. Johnson*, 58 N. Y. 614.)

The judgment of the district court is affirmed.

Opinion by Beatty, J.

[No. 844.]

EX PARTE R. C. ALLEN.

HABEAS CORPUS, SUFFICIENCY OF PETITION.—A petition for *habeas corpus* which fails to state any facts from which it can be inferred that petitioner's imprisonment is illegal is insufficient to authorize the issuance of the writ.

IDEM—SECTION 368 COMPILED LAWS CONSTRUED.—The provisions of the statute that the writ should issue "where a party has been committed on a criminal charge without reasonable or probable cause," only applies to cases where the evidence given upon the examination is insufficient to warrant the committing magistrate in holding the prisoner to answer.

IDEM.—Petitioner cannot claim the issuance of a writ of *habeas corpus* for the sole purpose of impeaching the witnesses who testified against him at his examination.

APPLICATION for a writ of *habeas corpus*.

The facts sufficiently appear in the opinion.

By BEATTY, J.:

This is a petition for the writ of *habeas corpus*, in which the petitioner alleges that he is unlawfully imprisoned by the sheriff of Lander county. But the petition fails to state any facts from which it can be inferred that his imprisonment is illegal, and is, therefore, insufficient to authorize the issuance of the writ. (*Ex Parte Deny*, 10 Nev., 213.)

It appears that the petitioner has been committed for a felony, and it is alleged in general terms that the committing magistrate exceeded his jurisdiction, and that the petitioner is imprisoned without reasonable or probable cause. These are mere conclusions of law, not the statement of facts, and, if nothing further appeared in the petition, would warrant the refusal of the writ. But the petitioner goes on to detail the proceedings had before the district judge of Lander county on the return to a writ of *habeas corpus* heretofore issued in his behalf, from which it appears that he claims the right in this proceeding to introduce evidence to rebut that upon which the committing magistrate acted in holding him to answer. He does not claim (apparently) that there was not reasonable cause for his commitment, but only that

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he can impeach the witnesses who testified against him at his examination.

If this is the ground upon which he seeks to be discharged it is not valid. The case provided for in the statute is "where a party has been committed on a criminal charge without reasonable or probable cause." (1 Comp. L., Sec. 368.) This, of course, has reference to the proceedings prescribed by the criminal practice act, and applies only to the cases where the evidence given upon the examination was insufficient to warrant the committing magistrate in holding the prisoner to answer. It does not authorize a retrial in this proceeding of the matters then in issue. The prisoner is not entitled to be discharged upon *habeas corpus* unless his imprisonment was unlawful, and his imprisonment is not unlawful, no matter how innocent he may now be able to prove himself, if the evidence taken on his examination was sufficient to warrant the belief that he was guilty. In such case he must wait until the charge against him has been ignored by the grand jury, or until he has been tried and acquitted. It was never designed by the legislature that the writ of *habeas corpus* should be put to the use which the petitioner seeks to put it to. If every person who has been held to answer on a criminal charge could, by this proceeding, compel the district judges first, and each of the justices of this court in succession afterwards, to give him an examination *de novo*, and for that purpose require witnesses to attend at the county-seat, and here at Carson from the remotest corners of the state the cost and inconvenience to the public would be too burdensome to be borne; and, therefore, when it appears, as it does in this case, that the object of the petitioner is, not to show that he was committed without reasonable cause, but to endeavor to rebut the case made against him at his examination, by the introduction of new testimony or by impeaching the witnesses for the prosecution, the writ will be denied. I have submitted this matter to my associates, and am authorized by them to state that they concur in the conclusion that the petition should be dismissed upon the grounds stated. Let the petition be dismissed.

Argument for Appellant.

[No. 797.]

THE STATE OF NEVADA, RESPONDENT, v. NORTHERN
BELLE MILL AND MINING COMPANY, APPEL-
LANT.

BOARD OF EQUALIZATION—COMPLAINT AGAINST ASSESSMENT FOR TAXES, HOW MADE.—A complaint made by any person to the board of equalization orally or in writing, that an assessment is too high or too low, and asking that it be reduced or raised is sufficient to authorize the board to act.

IDEM—NOTICE TO BE GIVEN.—If the complaint is of undervaluation, the board must give reasonable notice to the party assessed when it will act upon the complaint.

IDEM—EVIDENCE OF VALUATION—ASSESSOR'S STATEMENT.—Statements made by the assessor in regard to the valuation of property before the board of equalization, in his official capacity and under the sanction of his official oath, is intended by the law to have the force of testimony, and such a statement is competent evidence upon which the board is authorized to act in raising the assessment.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

The facts appear in the opinion.

T. W. W. Davies and A. W. Crocker, for Appellant:

I. The action of the board of equalization in increasing the valuation of appellant's property without any legal evidence on which to base its action was unwarranted and illegal. Such action deprives appellant of its property without due process of law, and is in violation of article 1, section 8 of the state constitution. The board is of special and limited jurisdiction, and nothing in that regard is to be presumed in its favor. (*State v. Board Co. Com. Washoe Co.* 5 Nev. 319.) The board of equalization must be governed by the laws and rules regulating the proceedings of courts of justice while engaged in the discharge of like duties. (Comp. L. Nev., sec. 3139; *People v. Goldtree*, 44 Cal. 323.)

II. The board of equalization has no jurisdiction to hear and determine, except in complaint. The complaint must state sufficient facts to warrant the board in its action. (*People v. Reynolds*, 28 Cal. 107; *People v. Flint*, 39 Cal. 670; *People v. Goldtree*, 44 Cal. 323.) The unverified paper of the assessor filed in this case does not contain a single

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statement of fact, which, if true, would warrant the board in adding to the valuation of appellant's property as returned.

III. The board of equalization has no right to add to the assessed valuation of property without judicial evidence. (*People v. Reynolds*, 28 Cal. 112.) The statements heard by the board of equalization, not under oath or affirmation, were not judicial evidence. (Best on Evidence, Morgan's notes, par. 56, p. 69, sec. 59, p. 74; *Irwin v. Cook*, 15 Johns. 239; *Penfield v. Carpenter*, 13 Johns. 350; *Haswell v. Bussing*, 10 Johns. 128; Bouvier's Dict. Max., sec. 130, 2d column, p. 430.)

John R. Kittrell, Attorney-General, for Respondent:

I. The law does not require that complaints made before the board of equalization should be verified. (Comp. Laws, secs. 1571, 1575; *Paul v. Beegan*, 1 Nev. 327; *State v. Wright*, 4 Nev. 251.)

II. The board is authorized to act upon its own judgment. (Cooley on Taxation, 291; *Tweed v. Metcalf*, 4 Mich. 579; *Case v. Dean*, 16 Mich. 12; *Bellinger v. Gray*, 51 N. Y. 610.)

III. The presumption is that the lower court was sustained by the evidence in the absence of a showing to the contrary. (*Carpenter v. Waddell*, 1 Nev. 332; *State v. Bonds*, 2 Nev. 265; *Johnson v. Sepulveda*, 5 Cal. 149; *Reed v. Reed*, 4 Nev. 395; *Guy v. Washburn*, 23 Cal. 111.)

By the Court, BEATTY, J.:

This is a suit for delinquent taxes, in which the state recovered a judgment, from which, as well as from the order of the district court overruling its motion for a new trial, the defendant appeals.

As a defense to the action the defendant pleaded fraud in the assessment, alleged to consist in this, that the board of equalization added thirty-two thousand two hundred dollars to the assessed valuation of its property, without any complaint having been made to the board of under-valuation by the assessor, and without any legal evidence to support such a conclusion. As to the taxes due on the assessor's

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valuation, a tender was pleaded. The court, however, found that the action of the board of equalization in raising the taxes was regular and valid, and gave judgment for the full amount claimed, including penalties and costs of suit.

The only question involved in the appeal is as to the correctness of this finding.

It is not pretended that the valuation, as fixed by the board, was excessive or unjust, but merely that it was invalid, because the board had no complaint or evidence before them upon which they were authorized to act. There may be a question whether any irregularity in the proceedings of the board of equalization, in raising an assessment, would constitute a good defense to a suit for taxes, unless it also appeared that the valuation so fixed was unjust; but it is not necessary to discuss that question here, because it appears that, in this case, the proceedings of the board were, as found by the district court, regular and valid.

The assessment-roll was before them, and upon that roll a certain mill and water-pipe of the defendant were assessed at thirty-five thousand dollars, and certain improvements on the mine, consisting of tramway, etc., at eight hundred dollars. Such being the case, the following written complaint was laid before them:

State of Nevada, County of Esmeralda.—To the Honorable the Board of Equalization in and for the County of Esmeralda, State of Nevada: The undersigned respectfully represents that he is a resident of the county of Esmeralda, and is now the duly elected and acting assessor of said county, and, as such is acquainted with the value of the property therein; that in his opinion, the property of the Northern Belle Mill and Mining Company was given in at too low a figure by the superintendent thereof at the time of giving in his statement. I would, therefore, ask that the valuation of said property be raised as follows: On mill and water-pipe, from thirty-five thousand dollars to seventy-five thousand dollars; on improvements on the mine, tramway, etc., from eight hundred dollars to three thousand dollars.

All of which is respectfully submitted.

Dated at Aurora, this twentieth day of September, 1875.

DENNIS THOMPSON,
County Assesor.

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This, it is contended, is not a sufficient complaint under the revenue law, to authorize the board to act; because, first, it is not verified; and, second, it contains no allegation that the assessed valuation of the property is too low; but only that the valuation, as given in by the superintendent, was too low, while there is nothing to show that it was assessed as given in. In answer to the first objection, it is only necessary to say that if the word "complaint," as used in the revenue law, is to be understood in the same sense which belongs to it as used in the civil practice act, it does not follow that it must be verified. But in fact, there is no reason for attributing to it any such sense. It is not even required, either expressly or by any necessary implication, to be in writing, and, if such was the intention of the legislature, it is far from manifest on the face of the law.

What is clearly required is that some one should complain to the board (whether orally or in writing is not prescribed) that some assessment is too high or too low, and ask to have it reduced or raised. If the complaint is of undervaluation, and the board find it necessary to raise the valuation, they must give reasonable notice to the party interested of the time when they will act in the case, and he, if he chooses to appear, has a right to be heard and to produce evidence before the matter is decided. All these requirements of the law seem to have been substantially complied with in this case. It is true the complaint filed by the assessor did not allege directly and with scientific precision that defendant's assessment was too low, and that its real value was the amount to which the board was asked to raise it. But it was sufficiently definite, read in connection with the assessment, to be easily understood in that sense by any man of common understanding, and it was therefore sufficient. It was never the intention of the legislature that every man who had occasion to complain of an erroneous valuation of property before the board of equalization should himself be able to file a complaint which would bear the test of a special demurrer, or that he should employ a lawyer to do it for him. The substantial require-

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ment of the law is fulfilled if the party to be affected by an increased assessment has reasonable notice and an opportunity to be heard before the board acts.

The remaining objection, that the board acted in this case without evidence is not sustained by the proof. Of course it devolved upon the defendant, the state having established a *prima facie* case by the introduction of the delinquent list (C. L. 3158), to prove that the board acted without evidence to justify the increased valuation. But the evidence introduced for this purpose showed that, although no witnesses were sworn and examined, the members of the board, as well as the assessor, made statements as to the value of the property in question. Whether or not the board could act upon facts within the knowledge of its members is a doubtful question, but, if the statement of the assessor was of a character to justify them in raising the assessment, as we presume it was, that was competent evidence.

The law expressly provides that he, in person or by deputy, shall attend the sittings of the board of equalization, and that he shall have the right of making any statement touching assessments as to which there are appeals made to the board. Of course it was with some purpose that the assessor was allowed to make statements to the board, and the only purpose that can be conceived for such statements is that they shall influence the action of the board on the matters depending before them. The idea seems to have been that the statements made by the assessor in his official capacity and under the sanction of his official oath should have the force of testimony. (See sec. 15, Rev. L.; C. L. 3139.) If this is so, and we think such is the meaning of the law, it cannot be said that the board acted in this case without any legal evidence.

There is nothing in the cases relied upon by the appellant which conflicts with the views herein expressed. The utmost extent to which they go is that the board cannot act without a complaint (not necessarily a written complaint) that the assessment is too low, nor without legal evidence

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to support the complaint. In our opinion both these requirements have been complied with in this case. (28 Cal. 107; 39 Cal. 670; 44 Cal. 323.)

The judgment of the district court is affirmed.

[No. 727.]

JAMES DUFFY, APPELLANT v. T. D. S. MORAN.
RESPONDENT.

JUSTICES' COURTS HAVE NO JURISDICTION OF EQUITABLE DEFENSES.—Under the constitution and statutes of this state, an equitable defense to an action cannot be plead in a justice's court.

EQUITY CASE BEFORE A JURY — WHEN MOTION FOR NEW TRIAL MUST BE MADE.—

When the court in the trial of an equity case calls a jury to decide special issues and the jury also find a general verdict: *Held*, that the presumption is, that the court only called the jury as advisory; that until the verdict has been sanctioned by the court it is no proof that it was actually rendered in the case, and that the party against whom the verdict is found is entitled to ten days after the findings are filed by the court in which to give his notice to move for a new trial.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

T. W. W. Davies, for Appellant:

The court erred in refusing to hear the case on its merits. The judge was not bound by the special issues found by the jury. It was useless to move for a new trial until after the decision of the court was rendered. Until that time plaintiff was unable to state whether he wanted a new trial. (*Minturn v. Hayes*, 2 Cal. 595; *Smith v. Rowe*, 4 Cal. 6; *Walker v. Sedgwick*, 5 Cal. 192; *Still v. Saunders*, 8 Cal. 287; *Mahoney v. Caperton*, 15 Cal. 313; *Crowther v. Rowlandson*, 27 Cal. 376.)

Robert M. Clarke, for Respondent:

I. The verdict was rendered on the twenty-fifth day of November, A.D. 1874; the judgment entered December 3, and the motion for new trial filed December 8, A.D. 1874. The motion was therefore too late. The court below acquired

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no jurisdiction to grant a new trial, and for this reason the order denying the new trial must be affirmed. (Civ. Pr. Act, sec. 197.)

II. The defendant having entered under a parol gift, and having made valuable improvements in pursuance of such gift, the case is without the statute of fraud, and the gift will be upheld. (1 Lead. Cases on Equity, 730, 731, 732, 733, 734; 14 Johnson, 15; 13 Conn. 479; 18 Id. 222; 8 N. H. 9; 20 Mo. 81; 4 Wis. 79; 1 Binney, 308; 6 Watts, 509; 2 Casey, 519; 7 Barr, 103; 6 Watts, 509; 4 Md. Ch. 133; 6 Md. 435; 24 Vt. 560; 4 Barr, 353; 4 Watts, 317; 3 Kelly, 82; 19 Ark. 23.)

By the Court, LEONARD, J.:

This action was commenced in the justice's court, Carson township, to recover possession of the premises described in the complaint, situate in Carson city. Plaintiff alleged in his complaint that he was the owner of said premises, and that defendant was his "tenant-at-will," under an agreement with plaintiff to quit and surrender the same to plaintiff on demand; that plaintiff, before the commencement of this action, had demanded the premises, in writing, of defendant; that defendant had refused, and still continued to refuse, to comply with said demand.

Defendant in his answer denied plaintiff's ownership and defendant's occupancy as a tenant-at-will of plaintiff under an agreement with plaintiff to quit and surrender the premises to plaintiff, or otherwise. He also denied that plaintiff had demanded the possession of the premises in writing. For further answer defendant alleged that he was the owner of said premises, and entitled to the possession thereof, as against plaintiff and all the world; that on or about the —— day of March, 1873, the plaintiff then being the owner thereof, in consideration of love, affection, friendship and esteem, and in consideration that defendant would improve and occupy the same, presented and gave the premises to defendant; that thereupon defendant, with the knowledge and consent of plaintiff, and at his instance, entered into and upon said premises, and

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inclosed and improved the same, and erected a dwelling-house thereon at an expense of five hundred and fifty dollars to defendant; that, by reason of the facts stated, plaintiff was estopped to deny defendant's possession, right of possession and title, and that defendant had acquired the right of possession and equitable title to the property. Such being the nature of the answer, on motion of defendant, the court certified the pleadings to the district court of the second judicial district, on the ground that it appeared that the title of said premises was put in issue.

It is patent from defendant's answer that his real and only defense was the equity last set up, and that the denials contained therein were all based upon such equity. It is also plain that under the statute and constitution of this state such defense could not properly have been pleaded in the justice's court. (Civil Practice Act, section 532; Cont. article 6, sections 6 and 8.)

This defense was set up, of course, with a view of removal of the cause to the district court, which alone could try the issue presented. However, if defendant had not tendered this issue in the justice's court, but had contented himself with denials only, still the justice would have been obliged, under the statute, to transfer the cause to the district court, and in the last named court it is more than probable that defendant would have been permitted to amend his answer by setting up the equity stated. Both parties appeared in the district court, and the cause was tried upon the issues made in the justice's court, without objection on the part of either. We shall, therefore, consider the case as though it had been instituted in the district court.

At the trial a jury was impaneled and instructed to decide certain issues of fact submitted to them in writing by the court, all of which were embraced in the equitable defense set up in the answer. The issues were decided by the jury in favor of defendant, and they also found a general verdict for defendant. After the rendition of the verdict, the cause was continued for argument "as to what the judgment should be." The verdict was dated November 25, 1874.

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Judgment for costs against plaintiff was rendered by the court December 3, 1874, and on the eighth of the same month, plaintiff gave notice of motion for new trial. The court refused to hear the motion on its merits, and overruled it on the ground that the notice was not given in time; to wit, within five days after the rendition of the verdict.

The only question requiring our decision is, whether or not the notice of motion for new trial was given in time. The answer must depend upon another question; that is to say, whether the cause was in fact tried by the court or by the jury. If by the former, it was in time; if by the latter, it was too late, for the statute is too plain to be misunderstood: "The party intending to move for a new trial shall give notice of the same, as follows: When the action has been tried by a jury, within five days after the rendition of the verdict; and when the action has been tried by the court * * * within ten days after receiving written notice of the rendering of the decision of the judge." (Sec. 197 Civ. Prac. Act.)

Defendant admitted that the legal title was in plaintiff, but against that set up an equity which he claimed was superior to the legal title. Whether or not that equity existed was the only question in the case, and upon that neither party could have demanded a jury. (*Lake v. Tolles*, 8 Nev. 285; *Lee v. Beatty*, 8 Dana, Ky., 204; *Iler v. Routh*, 8 How. (Miss.), 276.)

In such a case, when there are contested questions of fact, the chancellor may, and oftentimes should, call a jury to assist him at arriving at a just conclusion, but the verdict is merely advisory and only to satisfy his conscience. If he is not satisfied with it, he can and should disregard it. If it is satisfactory, he can and should adopt it and file his findings and decree accordingly. (*Van Fleet v. Olin*, 4 Nev. 98; *Lee v. Beatty* and *Iler v. Routh*, *ubi supra*; *Black v. Shreve*, 2 Beasley, N. J. 456; *Hall v. Layton*, 10 Tex. 55.)

"It can never be known what effect is given to the verdict, or whether any is given to it, until the subsequent hearing upon the merits and a decree rendered thereon by the court. Until the verdict has been sanctioned and established by

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the court, it is no proof of any fact but that it was actually rendered in the case, and not proof of the facts found thereby. The verdict, independent of the adoption of it by the court, can establish nothing in the case." (*Allen v. Blunt*, 3 Story, 746; Daniell's Ch. Pl. and Pr., 1146, note.)

In a chancery suit the action is not "tried" until the verdict has been "sanctioned and established" by the chancellor. In this case it was not tried until after the argument of counsel, "as to what the judgment should be." There is nothing in the transcript showing that the court submitted to the jury anything but the special issues stated, and, it being a case of purely equitable cognizance, we cannot presume the court called the jury for any other purpose except to be advised by it.

Certainly, the fact that the jury found against plaintiff upon the issues submitted to them was, necessarily, no proof that the court would finally so find after argument, or that the court would find against him in any respect. We think this cause was tried by the court. If we are correct in the conclusions already expressed, the court should have filed his findings within ten days after the trial, either adopting or rejecting the findings of the jury. By its acts it did so in effect. Our opinion is that plaintiff not only had a right to think he had ten days after findings were filed by the court in which to give his notice, but that he, in fact, had that length of time after the court rendered its judgment for costs against him on the third day of December.

The order overruling appellant's motion for new trial should be reversed and the cause remanded, with directions to the district court to hear the motion and decide it upon its merits. It is so ordered.

Argument for Respondents.

[No. 814.]

WILLIAM ARRINGTON AND M. B. BARTLETT, RESPONDENTS, v. F. R. WITTENBERG, APPELLANT.

MECHANICS' LIEN—COUNTY RECORDER AUTHORIZED TO ADMINISTER OATH.—

Under the provisions of the statute of this state, county recorders are authorized to administer the oath and certify to the verification required by law in filing mechanics' liens.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion of the court.

G. W. Baker, for Appellant:

Section 2995 (2 Comp. L.) does not confer the power upon county recorders to take and certify affidavits.

The verification of a mechanics' lien is simply an affidavit that contains allegations required by statute to create a lien upon property, are true, etc. As a mechanics' lien is not required by law to be acknowledged, and no proof of such acknowledgment being required, we do not consider it possible to construe this section of our statute as conferring the power exercised by the recorder in this case, and if the recorder had not the power to administer the oath, certainly no lien was acquired upon these claims and the demurrer should have been sustained.

C. J. Lansing, Thomas Wren and Crittenden Thornton, for Respondents:

The word "proof" in the recording acts has long had a fixed and definite meaning. Its meaning has always been the testimony given under oath by a subscribing witness, as distinguished from the mere verbal declaration of a party to an instrument. It necessarily includes the taking and the administering of an oath. The power given to recorders to take proof includes all needed authority to make that proof legal and effectual by administering an oath. That the word "proof" is not synonymous with "acknowledgment" in the statute. (*Kimball v. Semple*, 25 Cal. 446; *Jackson v. Humphrey*, 1 Johns. 498; *Jackson v. Shephard*, 2 Johns. 77;

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Jackson v. Harrow, 11 Johns. 434; *Jackson v. Gould*, 7 Wend. 364; *Jackson v. Osborn*, 2 Wend. 555; *Bradstreet v. Clarke*, 12 Wend. 602; *Norman v. Wells*, 17 Wend. 136.)

Words having a definite and well known meaning in the law are deemed to be used in the same sense in subsequent statutes. (*Harris v. Reynolds*, 13 Cal. 514; *Robbins v. O. R. R. Co.* 32 Cal. 472.)

The liens of mechanics and material men are “instruments in writing” affecting real estate within the plain language of the statute. They affect titles to real estate in the same manner as mortgages, and may ripen into legal titles by like process of foreclosure. The only proof which is required to entitle them to be recorded, is a verification of the statement under oath.

By the Court, HAWLEY, C. J.:

This action was brought to foreclose several mechanics' liens. The defendant demurred to that portion of the complaint which sought to enforce certain liens which were sworn to before the county recorder, upon the ground that he was not such an officer, under the law, as was authorized to administer oaths in such cases. Section 2 of the act concerning county recorders and defining their duties (approved March 9, 1865, as amended March 2, 1871), provides that: “The county recorder of the several counties within this state are hereby empowered to take and certify the acknowledgment and proof of all conveyances affecting any real estate, or of any other written instrument, for which he shall receive the same fees as are now prescribed by law.” (2 Comp. L. 2995.) It is argued by counsel for appellant that this section confers the power upon county recorders to take and certify acknowledgments to conveyances and other written instruments, and nothing else; that the administering of an oath to a claim for a mechanics' lien is not an acknowledgment, or proof, of an instrument, and that the only authority given to the county recorder to administer oaths relates exclusively to such written instruments as are required, by the statute of this state, to be acknowledged. The law, in our judgment, is susceptible of a broader and more beneficial construction.

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It is conceded that under the provisions of the act concerning conveyances the county recorder would be authorized to take the proof of the execution of any conveyance, affecting any real estate, by the testimony of a subscribing witness. Sections 11 and 15 of said act (1 Comp. L., 239 and 243), provide that no proofs shall be granted except upon the oath or affirmation of a competent and credible witness. In such case the county recorder is authorized to administer the oath or affirmation necessary to authorize such conveyances to be recorded.

There is nothing in either of the acts which, by any fair or reasonable construction, limits the county recorder to the taking only of such proofs of conveyances or other written instruments as are required to be acknowledged.

It is within the power of the legislature to provide the manner in which the proofs of an instrument may be taken. It may be by an acknowledgment or affidavit. It was certainly the intention of the legislature in passing the act under consideration, to authorize county recorders to take the acknowledgment and proof of all conveyances affecting any real estate, or of any other written instrument, in the manner provided by law. This authority must, necessarily, extend to all such written instruments as are by law required to be recorded.

Every person entitled to a lien is required, within a specified time, to file with the county recorder a claim containing a statement of his demand, "which claim must be verified by the oath of himself, or some other person." In short, a mechanic's lien is a written instrument that is required to be recorded. The proof that entitles it to be recorded is the verification. The county recorder is, in our opinion, an officer authorized by law to administer the oath and take and certify the proofs in such cases.

The judgment of the district court is affirmed, and it is ordered that the remittitur in this case issue forthwith.



Argument for Respondent.

[No. 811.]

**H. WEINRICH ET AL., APPELLANTS, *v.* S. G. PORTEUS
ET AL., RESPONDENTS.**

APPEAL FROM ORDERS AFTER FINAL JUDGMENT.—An appeal from a special order made after final judgment must be taken within sixty days after the order is made.

IDEM—HOW APPEAL SHOULD BE TAKEN.—In taking an appeal from orders based upon affidavits, no statement on appeal is required. It is only necessary to annex the affidavits to the orders, and have them properly certified.

IDEM.—The fact that the orders are embodied in a bill of exceptions allowed by the judge, is not sufficient to prevent a dismissal of the appeal, unless the affidavits are annexed to the orders, and a certificate given as required by section 1401 Compiled Laws.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are sufficiently stated in the opinion.

Drake & Gaston, for Appellants:

I. It was not necessary to appeal from the first order as it was only the first step taken to secure the rights of obtaining a release of money subject to the attachment lien. The first order did not injure appellant until the second order was made. We contend that the first became a part of the second order, and must be so treated as to date within which appeal must be taken.

II. The motion to strike out the bill of exceptions ought not to prevail. (1 Comp. L. 1398; Civil Practice Act, sections 330, 337.)

J. A. Stephens, for Respondent:

I. An appeal from any special order made after final judgment must be taken within sixty days after the order is made and entered in the minutes of the court. (Civil Practice Act, section 330; Compiled Laws, section 1391; *Bornheimer v. Baldwin*, 42 Cal. 27; *Lower v. Knox*, 10 Cal. 480; *Kittredge v. Stevens*, 23 Cal. 283; *Towdy v. Ellis*, 22 Cal. 651.) The court cannot enlarge the time for taking an appeal. (*Dooling v. Moore*, 20 Cal. 141.)

II. This is not a proper case for a bill of exceptions.

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(Civil Pr. Act, sec. 332; *Wetherbee v. Carroll*, 33 Cal. 552; *Caulfield v. Doe*, 45 Cal. 221; *Quivey v. Gambert*, 32 Cal. 307; *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 257.)

By the Court, BEATTY, J.:

At the time of commencing this action plaintiffs caused an attachment to be issued and levied upon the moneys due, or to become due to the defendant Porteus upon certain fire insurance policies.

Porteus, claiming that the moneys so attached were exempt from execution, moved, upon affidavit, to discharge them from the attachment, and on the eighth of January, 1876, three days after the entry of judgment for plaintiffs, the court ordered the insurance agents to pay the money into the hands of its clerk. Subsequently, on the first of March, on motion of Porteus, and one claiming to be his assignee, on the same and additional affidavits, the court made two additional orders, directing its clerk to pay the amount due on two of the policies to the defendant, Porteus, and the amount due upon the third policy, the one claimed to have been assigned to the sheriff who had served the attachment. On the twenty-first of March following, this appeal was taken from these three orders, and in support of the appeal counsel for appellant prepared what he has denominated a bill of exceptions, which was allowed by the district judge on the eighteenth of July, 1876.

In this so-called bill of exceptions are embodied the various notices of motions and affidavits used in the district court, the orders appealed from, and a statement of the grounds upon which the appellants objected to their being made.

This being the state of the case, the respondents now move: First. To dismiss the appeal from the order of the eighth of January, upon the ground that it was not taken in time; and second, to strike from the record the so-called bill of exceptions, upon the ground that the appeal from these orders could only be supported by a statement prepared in conformity to the provisions of section 332 of the practice act. (C. L. 1393.)

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The first motion must prevail upon the ground stated. More than sixty days elapsed after the order of eighth January was made and entered before notice of appeal, and the right of appeal was thereby lost. (C. L. 1391; 42 Cal. 27; 10 Id. 480; 23 Id. 283; 22 Id. 651.)

The second motion must also prevail. The orders in question having been based upon affidavits, no statement on appeal was needed in order to bring them here for review. It was only necessary to annex the affidavits to the orders and have them properly certified. (C. L. 1398, 1401.) If the orders and the affidavits, as they appear in the transcript filed here, were properly certified, we should overrule respondent's motion to strike out, and merely treat the other parts of the bill of exceptions as surplusage. But, unfortunately, they are not properly certified and cannot be regarded in the present condition of the record. Being embodied in a bill of exceptions allowed by the district judge does not save them. The only bills of exception which can be brought up by appeal are those taken during the progress of a cause before judgment. (C. L. 1251, 1671; 33 Cal. 552; 35 Id. 257; 45 Id. 222.) If the order appealed from is based upon affidavits, it is sufficient to attach the affidavits to the order and bring them here properly certified by the clerk of the court or by the attorneys. (C. L. 1401.) And this, it seems, would have been sufficient in this case; but if not, it was necessary to prepare a statement according to the mode prescribed in section 332. (C. L. 1393.)

Respondent's motions to dismiss and strike out are sustained.

Argument for Respondents.

[No. 809.]

THE STATE OF NEVADA Ex REL. A. B. ELLIOTT,
RELATOR, v. BIAGGIO GUERRERO ET AL., RESPON-
DENTS.

MANDAMUS—WHEN NOT THE PROPER REMEDY.—Mandamus is not the proper remedy where relator has a plain, speedy and adequate remedy at law.

IDEM—MINING STOCKS.—Where relator claims that he is the owner of and entitled to certain certificates of mining stock which the trustees of a corporation refuse to issue to him: *Held*, that mandamus is not the proper remedy, as he has an adequate remedy at law by an action against the corporation for the value of the stock claimed.

IDEM—RIGHT OF THIRD PERSONS.—Mandamus ought not to be issued to compel the trustees of a corporation to issue certain certificates of stock to relator where it appears, from the petition, that the stock is also claimed by other persons not parties to the proceedings before the court.

APPLICATION for a writ of mandamus.

The facts appear in the opinion of the court.

R. H. Taylor, for Relator:

I. The mere fact that an action will lie does not necessarily supersede the remedy by mandamus. This is a proper case for a mandamus. (1 Comp. L., secs. 1508-9; *State of Nevada ex rel. William H. Sears v. W. T. Wright et al.*, 10 Nev. 175; *Fremont v. Crippen*, 10 Cal. 215; *McCullough v. The Mayor of Brooklyn*, 23 Wend. 461; *People v. Loucks*, 28 Cal. 71; *Marbury v. Madison*, 1 Cranch. 170.)

Robert M. Clarke, for Respondents:

I. Mandamus is not the proper remedy for the injury complained of. It is not a duty specially enjoined upon the respondents, by law, to issue the certificates of stock to the relator.

II. The relator has an adequate remedy at law by an action against the corporation for the value of the stock. (Civil Pr. Act, sec. 448; Angell & Ames on Corp., sec. 710; 2 Cow. 444; 10 John. 484; 10 How. 544; 1 Abb. Pr. 128; 2 Doug. 526; 3 R. I. 22; 6 Hill. 243; *Kimball v. Union Water Co.*, 44 Cal. 173.)

Opinion of the Court—Leonard, J.

By the Court, LEONARD, J.:

This is an original application to this court for a mandamus to compel respondents, as trustees of the Roman Capitol Gold and Silver Mining Company, a corporation incorporated and existing under the laws of this state, and having its principal office at Virginia city, to cause to be issued to relator seventeen hundred and ninety shares of the capital stock of said company.

The petition avers that on the sixth day of June, 1876, one Leopoldo Pucci obtained a judgment in the first judicial district court in this state against one B. Guerrero for the sum of nine hundred and thirty-nine dollars and sixty-six cents, and ninety-two dollars and ninety-five cents costs; that execution was duly issued, and stock belonging to said Guerrero, and standing in his name on the books of said company, was duly levied upon and thereafter sold by the sheriff of Storey county to relator and his assignors; that relator is now the legal owner of all of said stock and is legally entitled to have the same issued to him; that it is the duty of respondents to cause the certificates of such stock to be issued to him in due form; that relator has demanded of respondents the issuance of the same to him, but a majority of respondents refuse to issue, or cause to be issued, said certificates of stock or any part thereof.

Answering relator's petition, the respondents deny the levy and sale by the sheriff. They further deny as follows: That at the time of the alleged levy and sale, or at the date of said judgment, the said Guerrero was the owner of said shares or certificates of stock or any part thereof, but aver that at the said several dates said stock was the property of three certain persons named; that relator is legally entitled to have any of said stock issued to him; that it is the duty of respondents to issue or cause to be issued said stock to him.

Respondents also aver that relator was never in possession of any of said shares or certificates of stock; that he never presented any of the same to the secretary of said company, or demanded that it be transferred to him on the books of the company; that at the time of the alleged levy and sale the

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stock was in the possession and was the property of other persons, and was not the property of said Guerrero; that new certificates in lieu of the original certificates had been issued and delivered to other persons, without notice of the claim of relator or his assignors; that the new certificates are yet outstanding, and are claimed by other persons as their property. At the hearing upon the order of this court to respondents to show cause, certain evidence was introduced by relator, but in view of the opinion entertained by us concerning the case, it is unnecessary to review it.

We are of the opinion that mandamus is not the proper remedy, for the reason that relator has a plain, speedy and adequate remedy at law by an action against the corporation for the value of the stock claimed. (2 Cowen, 444; 10 Johns. 484; 10 How. Pr., 544; 1 Abb. Pr., 128, 2 Doug. (K. B.) 526; 3 R. I. 22; 44 Cal. 173; 40 Cal. 281; 10 Wend. 399; 4 Conn. 172; 6 Hill. 243.)

It is not claimed that these shares or certificates of stock possess any peculiar value; that is to say, any value beyond that of the same number of other shares of the company. Such being the case, the stock in question is a subject of pecuniary value only, capable of being fully compensated for in damages. (3 R. I., 22; 10 Johns., 484; *supra*.)

It is, however, argued by relator that an action against the corporation would not be an adequate remedy; that a judgment against the corporation would be, in part, against himself; that is to say, if relator is the owner of one-thirtieth of the capital stock, as claimed by him, that he would have to pay one-thirtieth of the judgment. But this conclusion does not follow. If he owns no other stock in the company, he certainly would not be subjected to the injury stated, for the reason that he would have no stock outside of this to assess, or to be affected in any other way; and as to the stock in question, if his claim is a valid one, he has a perfect remedy against the corporation for its value. If he has other stock in this company (which fact does not appear), that cannot be a foundation for giving him a rem-

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edy refused to all other parties whose stock the company will not transfer. (10 How. Pr. 551; 44 Cal. 175.)

There is an additional reason why the writ should be denied. The stock demanded by relator is claimed by other parties as their property, and those persons are not before us. The present proceeding is a very imperfect mode of trying questions touching their rights. If the stock belongs to those persons, certainly respondents ought not to be required to cause it to be issued to relator, and if this court should order it to be so issued it would be an indirect recognition of relator's superior rights thereto, without the presence of such persons, and without all the facts affecting their rights before us.

Mandamus denied.

[No. 728.]

AARON D. TREADWAY, RESPONDENT, v. JONAS
WILDER, APPELLANT.

STATUTE OF LIMITATIONS, HOW CONSTRUED.—The statute of limitations, like any other statute, is to be construed according to the manifest intention of the legislature, and in ascertaining such intention the language used should be construed, if possible, according to the usual meaning of the words used.

IDEM—LEGAL TITLE.—Under section 1022, vol. I Compiled Laws, a party is entitled to maintain an action for the possession of real property at any time before the expiration of five years of adverse possession after he obtained the *legal* title.

IDEM—CERTIFICATE OF PURCHASE—Where the legal title remains in the government until the issuance of a patent the statute of limitation does not commence to run until that date, the time between the date of the certificate of the purchase and of the issuance of the patent is not to be computed as a part of the five years of adverse possession.

RIGHT OF TRIAL BY JURY.—The right of trial by jury is a sacred constitutional right of which no litigant, in a proper case, can be deprived without his consent.

IDEM—JURISDICTION OF COURT.—A court has no jurisdiction to try an issue of fact in an action at law unless a jury is waived by consent of parties.

IDEM—WHEN A NEW TRIAL SHOULD BE GRANTED.—If the court refuses a demand for a jury to try issues of fact in an action at law, and tries the case without a jury, it is the duty of the appellate court, notwithstanding the fact that such issues may have been fairly tried and proper judgments rendered by the court, to grant a new trial. [BEATRY, J., *dissenting.*]

Argument for Respondent.

EQUITABLE ISSUES, HOW TRIED.—Where there are legal and equitable issues raised by the pleadings the equitable issues can be tried with or without the aid of a jury.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion of the court.

Robert M. Clarke, for Appellant:

I. The court erred in denying the defendant a jury. (Nash (Ohio) Pr. & Pl. 71-2; *Bodley v. Ferguson*, 30 Cal. 518; 36 N. Y. 569; 57 Id. 162; 44 Id. 554; 50 Id. 574; Waiver of Jury, sec. 1242 C. 8.)

II. Wilder, having occupied adversely for five years after pre-emption was completed and purchase-money paid, had title by prescription against Treadway. (1 C. L., secs. 1023-24; 50 Mo. 573; 43 Cal. 213.)

III. Treadway, having proved up and received his duplicate receipt for purchase-money, was the owner of the land and entitled to the possession thereof and could maintain an action for the possession. (*People v. Shearer*, 30 Cal. 647; *Hunt v. Howell*, 14 Id. 468; *Toland v. Mandell*, 38 Id. 43; 3 How. 441; 3 McLean, 108, 109; 4 Wallace, 218; *Byers v. Veal*, 43 Cal. 215; *Tyler v. Green*, 28 Id. 402; *McFarland v. Culbertson*, 2 Nev. 284.)

The moment Treadway became entitled to maintain his action the statute of limitations commenced to run, and five years thereafter his action was barred. (1 C. L. Nev., sec. 1049; 23 Mich. 34; 36 Cal. 540; and cases cited in *The 420 Mining Co. v. The Bullion Mining Co.*, 9 Nev. 243.)

Ellis & King, for Respondent:

I. The statute of limitations was not set in motion until after the patent of the United States was issued to respondent. (*Gibson v. Chouteau*, 13 Wallace, 93; *Henshaw v. Bissell*, 18 Wallace, 255; *Matthews v. Ferrea*, 45 Cal. 51; *Gardner v. Miller*, 47 Cal. 571; *Van Sickle v. Haines*, 7 Nev. 249; *M. M. & M. Co. v. Dangberg*, 2 Sawyer, 451.)

II. The court did not commit any error in refusing a trial by jury generally. There was no question raised

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either by the pleadings, or upon the trial, as to the date of the patent or as to the time which had elapsed since its issuance, and before the bringing of the action, and if there had been, that is a question of law, to be determined upon a mere inspection of the pleadings by the court.

As to damages claimed, no evidence was offered; there is no finding nor judgment for damages, and upon the trial that claim was abandoned. (*Lake v. Tolles*, 8 Nev. 290-1.) This is strictly, as the pleadings and judgment stand, an equity case. The mere form of pleading is immaterial. Appellant first claimed affirmative relief, and sought a conveyance from respondent; his striking out that portion of his prayer could not change the character of his pleading and make it any less an equitable defense or cross-bill. (50 N.Y. 574; 8 Nev. 290; *Rose v. Treadway*, 4 Nev. 460; *Weber v. Marshall*, 19 Cal. 457; *Arguella v. Edinger*, 10 Cal. 159; *Es-trada v. Murphy*, 19 Cal. 250.)

III. If in the result of the trial the appellant has not been deprived of any constitutional right; if by the action of respondent or the court, at any stage of the trial, all the rights of appellant have been preserved, as by waiver of damages, or by findings and judgment on all legal issues, in favor of appellant, then no reversal will be warranted. (9 Nev. 160; 13 Cal. 429; 32 Cal. 232-35; 45 Cal. 126, 128.) Where there are both legal and equitable defenses or causes of action, the court may separate the issues and first dispose of the equity features of the case, which may be controlling in their character. (19 Cal. 457; 10 Cal. 159; 19 Cal. 250.)

By the Court, LEONARD, J.:

Twice before, this action has been before this court on appeal. (8 Nev. 95; 9 Id. 69.) The character of the action is stated in the reports above referred to. The issues made by the pleadings at the last trial in the court below were the same as at former trials, with the exception that at the last defendant pleaded the statute of limitations, as follows: "That for more than five years prior to the commencement of this action, and for more than five years

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since the plaintiff had a cause of action against the defendant, as alleged in the complaint, this defendant was in the actual, quiet and peaceable possession of the premises described in the complaint, and that he held, occupied and possessed said premises under claim of right, and adversely to the said plaintiff and all persons whomsoever, and that said possession has been open, notorious, peaceable and continuous; whereby the defendant has acquired, and now has, as against the said plaintiff, and as against all persons whomsoever, a right and title by prescription to the said premises described in the complaint."

Defendant demanded a jury trial, which was refused by the court. Plaintiff obtained judgment in his favor for the land in dispute described in the United States patent only; that is to say, the land in question outside of the town site of Carson. No damages were claimed by the plaintiff or awarded by the court. Appellant moved for a new trial, on the grounds:

First. "Errors of law occurring at the trial which were, then and there, duly excepted to by defendant;"

Second. "Insufficiency of the evidence to justify the findings and decision of the court, and that the same are against law."

The motion for new trial was denied, and this appeal is taken from the order denying the same.

Appellant's assignments of errors are as follows:

First. Errors of law occurring at the trial duly excepted to, to wit:

1. "The court erred in denying defendant a jury trial (the defendant having demanded the same), the action being ejectment to try the title and right of possession to land, and various issues of fact being raised therein. No equitable relief is demanded, and, under the pleadings, none could be granted;"

2. "The court erred in excluding the testimony of Adolphus Waitz, register of the United States land-office, and the records of said office. Said testimony was competent, relevant and material, proving that the plaintiff had entered that portion of the land in dispute outside of the town-site

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limits of Carson city, and paid for the same on the fourth of March, 1865, and on the same day received the pre-emption certificate of payment. This testimony shows that plaintiff's right of action accrued to him on the fourth of March, 1865, and more than five years having elapsed from that date until the commencement of this action, the same was barred by the statute of limitation of actions, and the defendant had a valid claim by prescription to said land."

The third assignment of error, to wit: "Insufficiency of evidence to justify the findings," etc., as we regard the case, need not be considered.

This action was commenced in the court below May 9, 1871. According to the rejected evidence, respondent made proof and payment at the United States land-office as to the land outside of the town site of Carson city, March 4, 1865, and as appears on the face of the patent, introduced in evidence by respondent, the latter received a patent from the United States government conveying the last mentioned land to him, dated May 10, 1866.

We will first consider the second assignment of error stated. If the statute of limitation of this State commenced to run against respondent's cause of action at the date of proof and payment by him, to wit: March 4, 1865, instead of at the date of the patent, then the rejected evidence of Waitz, register of the land-office, together with the records of said office, was competent, relevant and material; otherwise not.

"Civil actions can only be commenced within the period prescribed in this act, except where a different limitation is prescribed by statute."

"In every action for the recovery of real property or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for five years before the commencement of such action." (1 Comp. L., secs. 1016, 1022.)

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Under the section last quoted, it cannot be doubted that respondent could maintain an action for the recovery of the lands in dispute, or for the possession thereof, at any time before the expiration of five years of adverse possession, after he had obtained the legal title.

Should it be admitted, then, as claimed by appellant, that respondent could have maintained an action of ejectment immediately after his proof and payment (which question we do not now decide), still, if the "legal title" did not pass from the government to respondent until the issuance of the patent, it follows, as to the land in dispute described in the patent, that even though respondent might have maintained this action on the fourth day of March, 1865, yet he was not barred, under the statute, from maintaining it at any time before the expiration of five years of adverse possession after the issuance of the patent to him.

It becomes necessary, then, to ascertain whether the statute of limitation in this case was set in motion at the date of proof and payment by respondent, or at the date of the patent.

It is well established that this statute should be construed like any other, according to the manifest intention of the legislature; and that in ascertaining such intention the language used should be construed, if possible, according to the usual meaning of the words used.

In speaking of the construction of a statute of limitation, Mr. Justice Livingstone, in 1812, said: "The court disclaims all right or inclination to put on statutes of limitation, which are found to be among the most beneficial, * * * any other construction than their words import. It is as much a duty to give effect to laws of this description * * * as to any other which the legislature may be disposed to pass. When the will of the legislature is clearly expressed, it ought to be followed without regard to consequences; and a construction derived from a consideration of its reason and spirit should never be resorted to, except where the expressions are so ambiguous as to render such mode of interpretation unavoidable." (*Fisher v. Harnden*, 1 Paine, C. C. 61.)

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Chancellor Kent, in *Demarest v. Wynkoop* (3 Johns. Ch. 146), maintained that it would be not only impolitic, but contrary to established rule, both in law and in equity, to depart from the plain meaning and literal expression of these statutes. (See also *Phillips v. Pope*, 10 B. Mon. Ky., 163; *Dickinson v. McCarny*, 5 Ga. 486.) The same views are generally, if not invariably, entertained by our state courts of the present day.

There are many decisions, all entitled to the greatest consideration, which hold that after proof and payment by a pre-emptor, he is, in fact, the owner of the land; that thereafter the government holds the land in trust for him; that thenceforth the government even cannot sell it to another or otherwise dispose of it, or appropriate it; that thereafter it is no longer a portion of the public domain, and that it can be taxed the same as though it had been conveyed by patent. But all of the decisions referred to, also hold that the legal title is in the government until the issuance of the patent, although the pre-emptor, after proof and payment, has such an equity that the government even cannot deprive him of the land. (*People v. Shearer*, 30 Cal. 647; *Beach v. Gabriel*, 29 Cal. 585; *Gibson v. Chouteau*, 13 Wall. 99; *Witherspoon v. Duncan*, 4 Wall. 218; 7 Ohio, 249; 16 Ohio, 34; *Estrada v. Murphy*, 19 Cal. 248; *Wilcox v. Jackson*, 13 Peters, 276; *Lindsey v. Miller's Lessees*, 6 Peters, 305; *Vansickle v. Haines*, 7 Nev. 250; *Astrom et al. v. Hammond*, 3 McLean, 109; *Fenn v. Holme*, 21 Howard's U. S. 488; *Union M. and M. Co. v. Dangberg*, 2 Sawyer, 455; *Mathews v. Fernea*, 45 Cal. 52.)

The "legal title" having remained in the government until the date of the patent to respondent, it follows that the statute of limitation did not commence to run until that date, and according to the principles laid down in *Vansickle v. Haines*, *supra*, that the time between the date of the certificate of purchase and of the patent is not to be computed as a part of the five years of adverse user necessary before the presumption of grant arises. (39 Ala. 38; 7 Ohio, 249; 15 Texas, 150.)

The court did not err in excluding the testimony of Waitz

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and the records of the land-office. We have deemed it beneficial to both parties to decide the important question just considered, although the case must be returned for a new trial, by reason of errors disclosed by the first assignment.

The right of trial by jury is a sacred constitutional right, *Right of trial by jury* of which no litigant, in a proper case, can be deprived without his consent; and if any of the material issues, to try which either party has a right to demand a jury, be decided against him by the court upon proofs admitted without his waiver of a jury, he is deprived of a substantial right, guaranteed to him by the constitution and laws. A court has not jurisdiction to try an issue which the constitution and laws declare shall be tried by a jury, unless a jury be waived; and if it be tried by the court when a jury is demanded, the party against whom the judgment is rendered upon such issue, is not bound thereby. And, so far as we are able to find, in case of trial by the court where a jury trial is a right, and is not waived, courts do not inquire whether or not the cause has been fairly tried by the court, as they do in instances of error without injury when the cause is tried by the proper tribunal.

Numerous cases are reported which were referred to a referee when the parties had the right of a jury trial, and the result, invariably, was a reversal, although they were fairly tried and proper judgments were rendered. And the reason is patent: a court cannot try an issue which is triable by a jury, unless a jury is waived, for the same reason that a justice's court cannot try a cause where the amount in dispute is more than three hundred dollars. It has not jurisdiction. Besides, had the cause been tried by a jury, they might have disregarded the evidence introduced against the party demanding a jury. (*The United States v. Rathbone et al.*, 2 Paine U. S. C. C. 578; *McMartin v. Bingham*, 27 Iowa, 234; *Shaw, Administrator, v. Kent*, 11 Ind. 80; *Ware v. Nottinger*, 35 Ill. 377; *Hinchly v. Machine*, 3 Greene, N. J. 476; *Davis v. Morris*, 36 N. Y. 571; *Andrews v. Pritchell*, 66 N. C. 387; *Fire Department of New York v. Harrison*, 2 Hilton, 458; *Greason v. Keteltas*, 17 N. Y. 491;

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Brown v. Hannibal and St. Joseph Railroad Company, 37 Mo. 299; *Inloes v. American Exchange Bank*, 11 Md. 185; *Cahoon et al. v. Levy et al.*, 5 Cal. 294; *The St. Paul and S. C. Railroad Company v. Gardner*, 19 Minn. 132; *Haskins v. Wilson*, 5 Wis. 106; *Scott et al. v. Russell et al.*, 39 Mo. 409.)

At the time a jury was demanded by appellant, so far as appeared by the complaint, this was purely an action at law. Defendant, in his answer, denied the allegations of the complaint, and, in addition, set up the plea of the statute of limitation, and title by prescription; also, an equitable defense, to wit: The alleged verbal contract between him and plaintiff; that plaintiff, after obtaining the patent, would convey the land inclosed by defendant outside of the town-site. There were, then, legal and equitable issues raised by the pleadings. The last was an issue which the court could try with or without the aid of a jury. Upon the other issues the defendant had a right to a jury, of which he could not be deprived without his consent. In such case the true practice is laid down in *Weber v. Marshall* (19 Cal. 457).

As to the action of the court upon the issue of damages, as well as that of occupancy by respondent of the land in dispute within the town-site, as a necessary condition precedent to a conveyance thereof by the trustee, appellant cannot complain, for the reason that they were both found in his favor. But the issue of adverse possession, and others touching the plea of the statute of limitations as to the land outside of the town-site, both of which were decided against him, he had an absolute right to have tried by a jury. It is true that the burden of proof as to those issues was upon appellant, but he was not obliged to make any proof until he had a jury to try them. We cannot presume that he put in all his proof upon those issues, inasmuch as a jury was denied him. We are aware that a patent conveying to respondent the land in dispute outside of the town-site was introduced by respondent in evidence, bearing the date upon its face of May 10, 1866, less than five years prior to the commencement of this action. Still, we do not know but appellant could and would have shown that such was not the true

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date, if he had been permitted to do so before a jury. We only know that he was deprived of the opportunity of doing so against his express demand. We are also aware, if a jury had been allowed, and the patent without objection admitted in evidence, that then its construction would have been a matter for the consideration of the court, and not the jury. But this conclusion does not now follow for the reasons above stated.

The judgment of the court below is reversed, and a new trial ordered.

BEATTY, J., dissenting:

I dissent from the judgment of the court, in so far as it orders a re-trial of the equitable issues arising upon the answer of the defendant.

When the case was called for trial it presented two distinct classes of issues to be decided—equitable issues and legal issues. According to the rule of *Weber v. Marshall* (19 Cal. 457), which, in the opinion of the court, lays down the correct practice in such cases, the district judge should have first tried and disposed of the equitable issues before calling a jury to try the issues involved in the case at law, and the defendant had no right to demand a jury trial of the whole case. The court, therefore, committed no error in refusing the demand for a jury at the time it was made. The error which it did commit was in undertaking to decide the issue raised by the defendant's plea of title by prescription, as to which he was entitled to the verdict of a jury. This error, however, did not in any manner affect the decision of the equitable cause of action relied upon by the defendant as a separate and distinct defense. There is no reason, therefore, why that decision should be set aside. There are two distinct questions to be decided. One has been correctly decided; but, in the decision of the other, error has intervened. The appellant is entitled to a re-trial on the one question, but not of the other.

As to the questions principally discussed in the opinion of Justice Leonard, I concur in the conclusion that the plaintiff had five years after the issuance of his patent in which to commence his action.

Argument for Appellant.

[No. 829.]

THE STATE OF NEVADA, RESPONDENT, v. CHIN WAH
(CHINAMAN), APPELLANT.

WHEN JUDGMENT SHOULD BE AFFIRMED IN A CRIMINAL CASE.—When the defendant in a criminal case fails to put in an appearance in the appellate court the judgment of conviction will be affirmed upon motion. (1 Comp. L. 2109.)

APPEAL from the District Court of the Fifth Judicial District, Lander County.

John R. Kittrell, Attorney-General, for Respondent:

By the Court, BEATTY, J.:

This is an appeal from a judgment convicting the defendant of a felony. The time allowed the appellant to argue his case having expired without any appearance on his part, the judgment is affirmed in obedience to the provisions of the statute. (C. L. 2109.)

[No. 803.]AGNES R. DANIELS, APPELLANT, v. J. C. DANIELS,
RESPONDENT.

JURISDICTION OF COURT AFTER EXPIRATION OF TERM.—The district court has no jurisdiction at a subsequent term to set aside a default or vacate a decree or judgment rendered at a previous term of court unless its jurisdiction is saved by some proper proceeding instituted within the time allowed by law.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

The facts are stated in the opinion of the court.

Thomas H. Wells, for Appellant:

I. The order appealed from is properly before this court. It is an order made upon affidavit, after final judgment; hence, it can be appealed from, and the judgment-roll and order only need be brought up. (Pr. Act, sec. 337.)

II. The order, when made, was, that a default and final

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judgment, entered at a former term, be set aside and vacated. There had been personal service of the summons on defendant in Esmeralda county, Nevada; hence the court had no power to make the order appealed from. (25 Cal. 49, 169; 30 Cal. 192; Pr. Act, sec. 68.)

T. W. W. Davies, for Respondent:

I. Appellant should have embodied the judgment-roll in a statement, or at least the minutes of the court showing when the judgment was ordered, in order to show that the judgment was entered at a former term. There is nothing in the statement showing that proceedings to vacate the default and judgment were not commenced before the expiration of the term at which the default and judgment were entered.

The proceedings of the district courts, being courts of general jurisdiction, are presumed to be regular. There is no certificate of the clerk or judge, nor is there any pretense that the papers contained in this transcript were all the papers or testimony used and adduced on the hearing when the order appealed from was made. The order appealed from being regular on its face, and such a one as the court had power to make, must stand. (*White v. White*, 6 Nev. 20; *Dean v. Pritchard*, 9 Id. 232; *Sherman v. Shaw*, 9 Id. 151.)

II. Under section 68 Civ. Prac. Act, Stats. 1869, the district court has the largest discretion in regard to affording the proper relief in cases of default. And we submit, that on the merits of the case, as presented in the *ex parte* transcript, the action of the court was right. (*Howe v. Coldren*, 4 Nev. 175.)

By the Court, LEONARD, J.:

This is an appeal from an order of the eighth judicial district court, setting aside the default of defendant, vacating the decree rendered against him, reinstating said cause, and allowing defendant to file his answer. Default was entered January 18, 1876, and decree of judgment rendered March 22, 1876.

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Respondent's counsel, in their argument, claim that soon after default was entered, they sent to the clerk of said court the necessary papers for opening the default, etc., but it is admitted that they were not filed by the clerk or served upon counsel for appellant until June 5, 1876. The order appealed from was made by the court June 8, 1876. At the several dates above-mentioned there were only two terms of said court, which commenced respectively, on the first Monday in June and December. In the year 1876, the June term commenced June 5, and the prior December term continued until the last-mentioned date. Defendant was served personally with summons in Esmeralda county, but failed to answer or otherwise plead within the statutory period.

Upon the hearing of the motion to set aside default, etc., plaintiff's counsel objected to the granting of the same, on the grounds that defendant had not shown due diligence, and that the court did not have jurisdiction to set aside the default or vacate the decree and judgment rendered at a previous term.

Appellant urges as error, the action of the court in granting respondent's motion, for the reason last stated.

It appears upon the face of the record herein, that respondent instituted proceedings in the court below to set aside the default and vacate the decree and judgment at the June term of said court, to wit, June 5, 1876. If any proceedings were commenced before the termination of the prior term which continued the jurisdiction of the court over the case, then the record, by proper motion in this court, should have been corrected so as to show such fact. In the present status of the case, we must presume the record before us speaks the whole truth, and that the default entered, and the decree and judgment rendered at the December term of said court, were set aside and vacated at the subsequent June term, when no proper steps had been taken during the December term to continue jurisdiction of the court over the case.

We think the court had no power to make the order appealed from, and that it is void.

Argument for Appellant.

It is well settled, upon the soundest policy, that after the adjournment of a term a court loses all control over its decrees and judgments rendered at such term, unless its jurisdiction is saved by some proper proceeding instituted within the time allowed by law. In this case no such proceeding was commenced. (*Carpenter v. Hart*, 5 Cal. 406; *Suydam v. Pitcher*, 4 Cal. 280; *Robb v. Robb*, 6 Cal. 21; *Shaw v. McGregor*, 8 Cal. 521; *Lattimer v. Ryan*, 20 Cal. 632; *Bell v. Thompson*, 19 Cal. 708; *DeCastro v. Richardson*, 25 Cal. 52; *Clark v. Strouse*, 11 Nev. 79.)

If the respondent has any rights he must assert them in a court of equity. (5 Cal. 407.)

The order of the court below is reversed.

[No. 830.]

THE STATE OF NEVADA, RESPONDENT, v. JAMES L. JOHNSON, APPELLANT.

CRIMINAL LAW—ERRORS MUST BE SET FORTH IN BILL OF EXCEPTIONS.—Facts tending to show that the court erred in the admission of testimony upon the trial of a criminal case must be included in a bill of exceptions, otherwise they cannot be considered on appeal.

DECEASED WITNESS—TESTIMONY OF, WHEN ADMISSIBLE.—The testimony of a deceased witness given under oath in a proceeding authorized by law, where the opposing party had the opportunity of a cross-examination is admissible as evidence against such party in any subsequent trial of the case.

IDEM—UNCONSTITUTIONAL JURY LAW.—The court in impaneling a jury upon the former trial of defendant, when the deceased witness testified, conducted the proceedings under the provisions of the jury law of 1875, which has since been declared unconstitutional: *Held*, that the fact that the court erred in impaneling a jury was not sufficient ground to justify the exclusion of the testimony of the witness.

APPEAL from the District Court of the Fifth Judicial District, Lander County.

The facts sufficiently appear in the opinion of the court.

Grass & Harding, for Appellant:

I. The supposed testimony of Emery read on the last trial of defendant was given on the first trial of the defend-

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ant when tried under the jury law of 1875. The proceedings were therefore void. (*State v. McClear*, 11 Nev. 39.)

II. Emery could not have been convicted of perjury had he testified falsely on the first trial, because an indictment will not lay for perjury in a void proceeding. (5th Ed. Bish. Crim. Law, 1028; *State v. Hall*, 25; 7 Blackford, Ind.)

John R. Kittrell, Attorney-General, for Respondent:

The testimony of the deceased witness was admissible. (1 Green. Ev., secs. 163, 166.)

But even should it be held that such testimony is not competent, or that it was not put before the jury after the required method, still, the error of its admission, if error there was, was effectually cured by the action of the judge in striking out all that part of it which was objected to by the counsel for defendant.

By the Court, HAWLEY, C. J.:

The appeal in this case presents but one question: Did the court err in admitting the testimony of the witness Emery, against the objections of appellant?

The bill of exceptions shows that appellant was indicted for murder, and afterwards, on the eighteenth day of January, 1876, tried before a jury impaneled under the provisions of the jury law that was, in *The State v. McClear* (11 Nev. 39), declared unconstitutional; that upon said trial John H. Emery, then sheriff of Lander county, was a witness for the prosecution; that he was duly sworn and testified in said case, and that his testimony was taken down in writing by the deputy county clerk; that appellant was again tried for the same offense; under the same jury law, on the thirty-first day of January, 1876, and the said John H. Emery again testified as a witness for the prosecution; that on the ninth day of October, 1876, the defendant was tried for the third time under said indictment, and the testimony of John H. Emery, then deceased, as given, and taken down by the clerk, on the first trial, was offered and allowed to be read in evidence against the objection of defendant; "that the same was inadmissible, and that the defendant was enti-

ted to be confronted by the witnesses whose testimony was given against him.”

Counsel for appellant in their brief claim that the court erred in admitting this testimony “without any proof being introduced to show that what was read was the testimony of said Emery at a former trial,” and that the testimony was introduced and allowed to be read without any proof that said Emery was dead. Neither of these points is sustained by any bill of exceptions.

If these statements of counsel were true, the facts should have been embodied in the bill of exceptions; otherwise they cannot be considered. (*State v. Larkin*, 11 Nev. 314.)

The rule that a defendant in a criminal case has a right to be confronted by his witnesses, was not in any manner violated by the introduction of the testimony of the deceased witness.

The testimony of Emery was given at the former trial, where defendant had the opportunity afforded him of a cross-examination. This is all the law requires. The record in this case shows that the witness was cross-examined by the defendant.

Whatever differences of opinion may have in former times existed upon this question, the rule is now too well settled to require any discussion that the testimony of a deceased witness, given under oath in a proceeding authorized by law, where the opposite party had the opportunity of a cross-examination, is admissible as evidence against such party in any subsequent trial of the same case. (*Mayor of Doncaster v. Day*, 3 Taunt. 262; *United States v. Wood*, 3 Wash. C. C. 440; *Chess v. Chess*, 17 Serg. & Rawle, 409; *Commonwealth v. Richards*, 18 Pick. 434; *Sloan v. Somers*, 1 Spencer, 66; *State v. Hooker*, 17 Vt. 659; *Kendrick v. The State*, 10 Humph. 479; *United States v. Macomb*, 5 McLean, 286; *Summons v. The State*, 5 Ohio St. 325; *State v. McO'Brien*, 24 Mo. 402; *State v. Baker*, Id. 437; *State v. Houser*, 26 Mo. 431; *State v. Harman*, 27 Mo. 120.)

Counsel for appellants contend that the testimony was inadmissible, because it was given at a trial wherein the proceedings were conducted pursuant to the provisions of

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the jury law that was declared unconstitutional. This point is not, in our judgment, well taken.

If no law existed authorizing the court to try defendant for murder at the time Emery testified, then counsel's position would be correct. But the court had jurisdiction, and was authorized to try the defendant for murder, and the exercise of this power was not derived from any unconstitutional statute. The fact that the court erred as to the manner of impaneling the jury does not furnish sufficient grounds for the exclusion of the testimony.

The case of *The State v. Raymond* (11 Nev. 98), wherein the defendant was convicted of murder in the second degree, was upheld, notwithstanding the fact that the jury law had been previously declared unconstitutional, because it did not affirmatively appear that the defendant had been deprived of a jury of twelve impartial men.

We have no doubt that the witness Emery could have been tried and convicted of perjury if he had sworn falsely upon the first trial. The court was authorized to administer the oath, it was taken in a proceeding authorized by law, and the testimony given was material to the issue.

The mere fact, as before stated, that the court erred in impaneling the jury under the jury law of 1875, instead of the law of 1861, was an error that resulted prejudicial to defendant, and authorized this court to grant a new trial (*State v. Johnson*, 11 Nev. 148), but was not sufficient to authorize the exclusion of the testimony of Emery at the subsequent trial. The case of *The State v. Hull* (7 Blackf. 25), cited by appellant, fully sustains the views we have expressed.

The judgment of the district court is affirmed.

Points decided.

[No. 828.]

THE STATE OF NEVADA, RESPONDENT, v. JAMES HARRINGTON, APPELLANT.

SECTION 2306 COMPILED LAWS CONSTRUED.—Section 2306 of the compiled laws only requires the court specially to instruct the jury that “no inference of guilt is to be drawn against him for that cause” when the defendant “declined to testify.” It has no application to a case where the defendant voluntarily makes himself a witness in his own behalf.

TESTIMONY OF DEFENDANT—COMMENTS OF COUNSEL.—If the defendant in a criminal case voluntarily testifies in his own behalf, the same rights exist in favor of the district attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inference from his failure to testify upon any material matter within his knowledge, as with other witnesses.

OPINIONS OF WITNESSES, WHEN NOT ADMISSIBLE.—A witness for defendant having testified that just preceding the shooting, deceased had hold of the defendant; that defendant was trying to free himself, and having described the action of the parties, was asked: “What did he (deceased) appear to be doing with his hand or arm?” the court refused to allow the question: *Held*, not to be erroneous, inasmuch as the witness had already stated all he saw or knew, and that the question called for an opinion, not the statement of any fact.

INSTRUCTION—HOSTILE DEMONSTRATIONS AND OVERT ACTS.—Defendant asked the court to instruct the jury that, “If the deceased made threats to the effect that he intended to kill * * * defendant, * * * and such threats had been communicated to the defendant; and if at the time and just previous to the killing, the deceased made hostile demonstrations toward the defendant, and the demonstrations * * * were such as to justify the belief that the deceased intended to carry out his threats, then the defendant would be justified in killing him, without retreating: *Held*, erroneous in this, that it failed to state many of the necessary elements of justification.

IDEM—MODIFICATION OF.—The court modified the instruction by inserting after “hostile demonstration” the words, “or overt act,” and added to the instruction the words: “But if it does not appear that the threats were followed by any overt act, the mere apprehension of danger is not sufficient to justify homicide,” and then gave the instruction as modified: *Held*, not erroneous.

IDEM—MEANING OF “OVERT ACTS.”—The term “overt acts” as used by the court meant any act of the deceased, which manifested to the mind of a reasonable person, a present intention on his part to kill defendant, or do him great bodily harm.

INSTRUCTIONS ASSUMING FACTS, WITHOUT ALLUDING TO THE EVIDENCE.—An instruction which assumes that from former threats, the deceased, at the time of the homicide had murderous intentions,” and that deceased had, previous to the killing, attempted to assault defendant, regardless of any evidence to establish such facts, is clearly erroneous.

Argument for Appellant.

TESTIMONY OF DEFENDANT'S BELIEF AT TIME OF HOMICIDE, ADMISSIBLE.—

A defendant charged with murder is entitled, in giving his testimony, to state to the jury whether at the moment of the discharge of his pistol at the deceased, he did, or did not, really believe that he was in danger of losing his life, or of receiving great bodily harm, for the purpose of showing the condition of his mind at the time, and for the purpose of establishing one of the necessary conditions of justification. It being left to the jury to weigh and consider the question whether such testimony is true or false.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

A. B. Elliott and William Woodburn, for Appellant:

I. The defendant is a competent witness for himself; and no inference of guilt is to be drawn against him, because he declines to testify. (1 Comp. L. 2305-6.)

II. He cannot be made a witness for the state against himself. (*The People v. Tyler*, 36 Cal. 522; *The People v. McGungill*, 41 Cal. 429.)

III. The fact that counsel for defendant made no objection at the time, to the argument of the district attorney, cannot affect the substantial rights of the defendant. (*The State v. Pierce*, 8 Nev. 304.) It was the duty of the court to have interposed the objection, and to have instructed the jury on the subject. (Comp. Laws, sec. 2306.)

IV. The instruction that if the jury believed "defendant's life had been repeatedly threatened," etc., should have been given. (*The State v. Kennedy*, 7 Nev. 377; *The State v. Hall*, 9 Nev. 61; *The State v. Stewart*, 9 Nev. 130; *The State v. Smith*, 10 Nev. 118; *The State v. Ferguson*, 9 Nev. 116; *People v. Scoggins*, 37 Cal. 676; 32 Iowa, 36; 8 Bush, Ky., 481; 46 Ill. 17; 47 Mo. 604; 2 Bishop on Criminal Law, 3d ed. sections 383, 384, 636, 644; 17 Ala. 587; *Phillips v. Commonwealth*, Cases on Self-defense, 383; *Grainger v. The State*, Id. 238.)

V. The court erred in refusing to allow defendant to testify as to his belief of danger at the time the fatal shot was fired. The authorities require that defendant must show that he did believe his life was in danger. The testimony

Argument for Respondent.

should have been submitted to the jury for what it was worth. As bearing upon the admissibility of this evidence, see *People v. Farrell*, 31 Cal. 583; *State v. Newton*, 4 Nev. 412.

VI. The court erred in modifying the instruction in regard to "overt acts." (*State v. Kennedy*, 7 Nev. 376; *Jackson v. State*, Cases on Self-defense, 481; *Little v. State*, Id. 490; *Phillips v. The Commonwealth*, Id. 383; *The State v. Stewart*, 9 Nev. 130.)

John R. Kittrell, Attorney-General, for Respondent:

There was no error in the court below sustaining the objection to the question asked the defendant while he was testifying in his own behalf, as to whether, at the time of firing the fatal shot, he believed his life to be in danger, etc. The question complained of, called only for the opinion or conclusion of the defendant; and that, too, at a time long subsequent to the occurrence, and to a matter exclusively in the defendant's secret mind, and which it was impossible for the prosecution to ascertain the truth of or even attempt to rebut. When a defendant offers himself as a witness he is subject to, and governed by, the same rules that apply to other witnesses. (See *Cohn's Case*, 9 Nev. 179.) He cannot testify that he believed himself in imminent danger. Whether such belief, in fact existed at the time, can only be properly arrived at and determined by the jury, from the acts of the parties, and the circumstances attending the affray. The assertion of the defendant as to his belief is no evidence of the fact. (1 Wharton on Crim. L., 7th ed., sec. 712, note "M.;" or Stephens Crim. L., 304-5.)

R. H. Lindsay, also for Respondent:

If defendant refuses to testify, the statute protects him from adverse comment or inference; but if he avails himself of the statute, he waives the constitutional protection in his favor, and subjects himself to the peril of being examined as to any and every matter pertinent to the issue. (*Commonwealth v. Mullen*, 97 Mass. 545; *Commonwealth v. Bonner*, 97 Mass. 587; *Commonwealth v. Morgan*, 107 Mass.

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199; *McGarvy v. The People*, 2 Lansing, 227; *Conners v. The People*, 50 N. Y. 240.)

By electing to testify, the defendant placed himself in the attitude of any ordinary witness irrespective of any interest in the cause. (*Norfolk v. Gaylord*, 28 Conn. 309.) It was not improper for the district attorney to comment upon the testimony of defendant. (*Andrews v. Frye*, 104 Mass. 234.)

By the Court, LEONARD, J.:

This is an appeal from the judgment of the district court of Storey county, rendered against appellant December 16, 1876, and from an order of said court denying his motion for a new trial. Appellant was accused and convicted of murder of the first degree in killing one John C. Sullivan, in said county, on or about July 22, 1876.

The record contains no formal motion for a new trial, nor are the grounds thereof embodied in the bill of exceptions; but all the errors alleged can be examined by this court on appeal from the judgment.

First. The bill of exceptions shows that without objection on the part of defendant, one Merrow, at the trial, testified as follows: "I was deputy constable of township No. 1, in this county, at the time this trouble occurred; I made the arrest; I had a conversation with Harrington, the defendant, in regard to the matter; I asked him what he did it for; he told me that Sullivan tore his coat; that is all the reason he gave; that is all he said." Subsequently defendant was called and sworn as a witness. He testified in his own behalf, but did not testify in relation to the matter stated by witness Merrow.

Counsel for defendant, in his argument before the jury, which preceded that of the district attorney, claimed and argued that the statements of witness Merrow were false. The district attorney in his reply, without objection on the part of counsel for defendant or the court, stated to the jury "that, inasmuch as the defendant, when testifying in his own behalf, had not contradicted the statement of Merrow, they must take said statement as absolutely true, that therefore it was true."

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The action of the district attorney in so addressing the jury, and of the court in failing to interpose objection thereto, is assigned as error. Appellant also claims the court should have instructed the jury as provided in section 2306, C. L., when the defendant declines to testify.

Under the constitution of this state, no person accused of a crime can be compelled to testify against himself; but under the statute, at his own request, but not otherwise, he shall be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court. The statute further provides, that in all cases wherein the defendant in a criminal action declines to testify, the court shall specifically instruct the jury that no inference of guilt is to be drawn against him for that cause. (Comp. Laws, secs. 2305–6.) Courts have nothing to do with the wisdom or policy of a statute. Their only duty, in a proper case, is to enforce it.

Under the statute mentioned, in a case wherein the defendant in a criminal action declines to testify, the court shall specially instruct the jury as prescribed in the act. Certainly, there is nothing in the statute requiring the court to so instruct the jury in a case wherein he does not decline to testify; but, on the contrary, wherein he voluntarily makes himself a witness in his own behalf, as in this case. A defendant on trial in a criminal action, in this state, may plead not guilty, and thereafter sit in silence, or he may, at his option, testify for himself. If he chooses the latter course, he is to be held and treated, so far as his testimony goes, like any other witness. He cannot be cross-examined beyond the subject-matter upon which he has been examined in chief, for the reason that with him, as with other witnesses, the rules of evidence do not permit it; and, too, because such a proceeding would be compelling him to become a witness for the prosecution against himself. (*People v. McGungill*, 41 Cal. 430.) “If he does not choose to avail himself of the statutory privilege, unfavorable inferences cannot be drawn to his prejudice from that circumstance; and if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a state-

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ment, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to." (Cooley's Const. Lim. 317.)

In a note subsequently written, in referring to the text above quoted, Judge Cooley says: "What we intend to affirm by it is, that the privilege to testify in his own behalf is one the accused may waive, without justly subjecting himself to unfavorable comments; and that if he avails himself of it and stops short of a full disclosure, no compulsory process can be made use of to compel him to testify further. It was not designed to be understood that in the latter case his failure to answer any proper question would not be the subject of comment and criticism by counsel; but, on the contrary, it was supposed that this was implied in the remark that 'it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to.' All circumstances which it is proper for the jury to consider it is proper for counsel to comment upon." (See, also, *State v. Ober*, 52 N. H. 462; *State v. Cohn*, 9 Nev. 179; *State v. Huff*, 11 Nev. 27; *Connors v. People*, 50 N. Y. 240.) As affecting the right of the jury to consider, or of counsel to comment upon, the circumstances, we can perceive no difference between the refusal of defendant to answer a proper question upon cross-examination and neglecting to testify upon some material matter within his knowledge, proven against him by the prosecution.

The authorities are somewhat conflicting upon the question whether or not, if the defendant in a criminal case voluntarily testifies, he can be compelled upon cross-examination to answer a proper question concerning any fact upon which he testified in chief. It being unnecessary to decide the question in this case, we express no opinion upon it.

Our conclusions are that, if the defendant in a criminal action voluntarily testifies for himself, the same rights exist in favor of the State's attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon

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any material matter within his knowledge, as with other witnesses. Nor are the two cases cited by counsel for appellant (*People v. Tyler*, 36 Cal. 522; *People v. McGungill*, 41 Cal. 429,) opposed to our conclusions.

In the first case, defendant did not avail himself of the right conferred by statute, and offer himself as a witness in his own behalf. He did not testify. The district attorney, in his argument before the jury, called attention to the fact that the defendant had not testified in his own behalf, and argued and insisted before the jury that the silence of the defendant was a circumstance strongly indicative of defendant's guilt. Defendant's counsel objected to this course of argument, and requested the court to require the district attorney to refrain from urging such inference, but the court declined to interfere, and intimated that the law justified the counsel in the course pursued. The district attorney continued to urge before the jury that the silence of the defendant was a circumstance against him, and the defendant excepted.

At the close of the argument, defendant's counsel asked the court to instruct the jury that no inference of defendant's guilt should be drawn from the fact that he did not testify in his own behalf, but the court refused to so instruct. The court on appeal very properly held, upon such a state of the case, that the court below erred in permitting the district attorney to pursue the line of argument to which objection was taken, and especially in refusing to give the instruction asked.

In the second case, the defendant offered himself as a witness in his own behalf, and was only asked if he had had certain conversation with one Yates, testified to by said Yates, and he answered that he had not. He was examined no further by his counsel than concerning such conversation, nor was he examined upon any other point, but answered all questions required of him by the court. Upon the argument, counsel for the prosecution commented upon the fact, before the jury, that the defendant refused to be cross-examined as to the whole case. Defendant's counsel protested against such comments, but they were continued by permission of

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the court. The appellate court held that such action by the court below was error. No witness under the circumstances stated could have been cross-examined as to the whole case. If the court had compelled defendant to answer beyond the line of legitimate cross-examination, its action would have been error in a double sense: first, in allowing counsel to press in cross-examination further than is permissible in other cases; second, in compelling defendant to furnish, against his will and contrary to law, testimony for the prosecution. Defendant only claimed the rights of an ordinary witness under established rules of evidence. Counsel for the prosecution, by permission of the court, and against the rightful protest of defendant, contrary to the fact, construed a legitimate exercise of a legal right to be evidence of defendant's guilt.

It need not be stated that the facts of the two cases cited and the one in hand are so widely different that the former are no authority for appellant in this case.

In addition to the foregoing, it is proper to remark that it is apparent to our minds, from the bill of exceptions, that the comments of the district attorney complained of were called out by those of the defendant's counsel in declaring the testimony of witness Merrow to be false. In reply, the district attorney, to sustain the witness, and to show the truthfulness of his testimony, stated that the defendant, although he had an opportunity to do so, had not contradicted the witness. The comments, under the circumstances, were proper.

Second. At the trial, one Nelson, a witness for the defendant, testified that just preceding the shooting, deceased had hold of the defendant by the coat-sleeve or shoulder, and that defendant appeared to be trying to free himself; that defendant made a motion as if to strike deceased. Witness then testified as follows: "Sullivan made a motion; I can't tell what he was doing; his back was toward me; he raised his hand up; his elbow appeared to be about that high. [The witness here raised his hand to show; the right hand being high up, opposite his left breast, and the right elbow being extended to the right of his body.] I could not see

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where his hand was, because I was right behind him, and a little ways from him." Counsel for defendant then asked witness the following question, viz.: "What did he appear to be doing with his hand or arm?" The district attorney objected, on the ground, that the question was incompetent and irrelevant, inasmuch as it called for the opinion of the witness. The question was clearly incompetent. The witness had already stated all he saw or knew. He had, by word and act, given the jury and court all the facts in his possession. What else could he say but to give his opinion of what deceased was doing? He was called to testify to facts, not give opinions or belief.

Third. Appellant complains of the definition of murder of the first degree given by the court to the jury. We are satisfied that the different instructions given by the court properly defined the crime mentioned, and that the jury could not have been misled thereby. (*State v. Stewart*, 9 Nev. 131.)

Fourth. Defendant's counsel asked the court to give the following instructions to the jury: "If the deceased made threats to the effect that he intended to kill, or do the defendant great bodily harm or injury if he did not stop keeping company with Julia Regan, and such threats had been communicated to the defendant; and if at the time and just previous to the killing, the deceased made hostile demonstrations toward the defendant, and the demonstrations and circumstances connected therewith were such as to justify the belief that the deceased intended to carry out his threats, then the defendant would be justified in killing him without retreating."

The court modified this instruction by inserting after the words "hostile demonstrations" the words "or overt act," and added at the end the following: "But if it does not appear that the threats were followed by any overt act, the mere apprehension of danger is not sufficient to justify homicide." As modified, the court gave the instructions to the jury.

As presented, it was erroneous for several reasons. It gave, as the only necessary test of justification, previous

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threats communicated to defendant, and hostile demonstrations and circumstances connected therewith, before and at the time of the killing, which justified the belief that the deceased intended to carry out his threats. It is plain that many of the necessary elements of justification are wanting in the instruction.

In *State v. Stewart*, 9 Nev. 130, the court say: “Mere threats, unaccompanied by some demonstrations of hostility, from which the accused might reasonably infer the intention of their execution by deceased, would not justify the homicide. Nor would acts of hostility, however violent of themselves, excuse the slayer. There must be some overt acts or words at the time, clearly indicative of a present purpose to do the injury. The defendant must show either that he was actually assailed, or that he was menaced by the deceased at the time, in such a manner as to induce him as a reasonable person to believe that he was in danger of receiving great bodily harm.” (*State v. Hall*, 9 Nev. 58; *People v. Scoggins*, 37 Cal. 683.)

This instruction was also lacking the further and indispensable qualification that the defendant acted under the influence of fears excited by such threats, hostile demonstrations and circumstances, and not in a spirit of revenge.

Appellant claims that the instruction as modified must have conveyed to the minds of the jury the idea that the words “overt acts” meant only such acts as striking or assailing. This view is clearly erroneous. The term “overt acts” as used by the court meant any acts of the deceased, which manifested to the mind of a reasonable person, a present intention on his part to kill defendant, or do him great bodily harm. If there is any error in the modified instruction it is because it is too favorable to appellant.

Fifth. The court refused to give the following instruction to the jury, which refusal is claimed as error, to wit: “If you believe from the evidence that the defendant’s life had been repeatedly threatened by the deceased, then the defendant may lawfully arm himself to resist the threatened attack; he may leave his home for the transaction of his

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legitimate business or for any lawful or proper purpose, and if on such an occasion he met the deceased, and had reason to believe him to be armed and ready to execute his murderous intention; and if the defendant, from the threats, any attempted assault previous to the killing, and the circumstances attending the meeting, had reasonable ground to believe, and did believe, that the presence of deceased put his life in imminent peril, then he would not be obliged to wait until he was actually assailed, but may kill, and it will be justifiable. He could not, under such circumstances, hunt the deceased and shoot him down like a wild beast, nor has he the right to bring about an unnecessary meeting in order to have a pretext to slay him; but neither reason nor the law demands that he shall give up his business and abandon society to avoid such meeting and the killing of his adversary."

This instruction assumes that from former threats the deceased, at the time of the fatal meeting, had "murderous intentions," regardless of the evidence. Such assumption is unwarranted. It would have instructed the jury to justify defendant in shooting deceased, because of "former threats, any attempted assault previous to the killing, and the circumstances attending the meeting, if defendant had reasonable ground to believe and did believe that the presence of deceased put his life in imminent peril," even though defendant was in the wrong and the first assailant. It assumes, regardless of any proofs to establish the fact, that deceased had, previous to the killing, attempted to assault defendant. It was properly refused.

Next and last, appellant complains of the action of the court in refusing to allow him, when testifying as a witness in his own behalf, to answer the question hereafter stated. The bill of exceptions shows the following: "Counsel for defendant then asked defendant the following question: 'At the moment of the discharge of the pistol at the deceased did you, or did you not, really believe that you were in danger of losing your life, or receiving great bodily harm?' To which question the district attorney objected, for the reason that the question was irrelevant and incompetent,

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inasmuch as it was the province of the jury to determine whether or not, from the attending circumstances, a reasonable man would believe himself in danger of losing his life, and the court sustained the objection. To which ruling of the court the defendant, by his counsel then and there duly excepted."

Let it be borne in mind that appellant's defense was justifiable homicide. He admitted the killing of deceased, but claimed it was done in necessary self-defense. In order to justify himself he was, by his own proofs, compelled to bring himself within the terms of sections 25 and 26 of the crimes and punishments act, which read as follows:

"Section 25. Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, property or person against one who manifestly intends, or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein.

"Section 26. A bare fear of any of these offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge."

Under the two sections of the statute just quoted, it is evident that, before the defendant could have been justified by the verdict of the jury, it must have appeared to their minds, from all the testimony in the case, not only that the defendant was at the time surrounded by such circumstances as were sufficient to excite the fears of a reasonable person, but also that he really acted under the influence of those fears, and not in a spirit of revenge. It was just as necessary for the testimony to show that his mind was in accord with the last condition stated in section 26 as with the one preceding. In other words, if the jury had been satisfied from all

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the testimony in the case, that the circumstances surrounding defendant at the time, were sufficient to excite the fears of a reasonable person, still they could not have justified him by their verdict, without being satisfied from the evidence that he really acted under the influence of the fears mentioned in the statute, and not in a spirit of revenge. In arriving at a conclusion as to whether a defendant accused of murder really acted under the influence of such fears, and not in a spirit of revenge, jurors oftentimes would, and properly too, consider that, even though the circumstances were sufficient to excite the fears of a reasonable person, yet he did not so act, but that he really acted in a spirit of revenge. They might conclude that the circumstances, ostensibly sufficient to justify his fears as a reasonable person, were, in fact, made so by the defendant for the sole purpose of justification, when really he acted in the spirit of revenge.

Suppose two men have for a long period been deadly enemies, and at last one kills the other under circumstances apparently sufficient to justify the fears of a reasonable man; certainly, under such circumstances, any juror would more readily believe that the homicide was committed in a spirit of revenge than if they had always been friends prior to the killing. In this case, the killing having been admitted by defendant, and the burden of proof having been upon him in some manner to show that he really acted under the influence of the fears stated in the statute, and not in a spirit of revenge, he had the indisputable right to strengthen other testimony by his own, under oath, in the presence of the jury, that at the time of the fatal shot he really believed his life was in danger, or that he was in danger of receiving great bodily injury. It was a fact proper to be considered and weighed by the jury, as to what the condition of his mind was at the time; and who so well knew in what spirit and with what motive he acted as defendant?

It is true that a defendant in a criminal action has inducements to misstate the motives that actuated him, as well as his beliefs at the time. So he has relative to any other fact. The law, however, does not make that a reason

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why he shall not be allowed to make his statement to the jury upon all matters concerning which he has a right to testify, and let the jury judge of the veracity of his testimony.

Besides, several of the instructions given by the court make it an essential pre-requisite to defendant's justification that he "did believe" he was in danger of losing his life or of receiving great bodily harm, as well as that, as a reasonable person, he had reason to so believe.

The court instructed the jury in part as follows: "The law of self-defense is founded on necessity, and in order to justify the taking of life upon this ground, it must not only appear that defendant had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily injury; but it must also appear to the defendant's comprehension, as a reasonable man, that to avoid such danger it was necessary for him to take the life of the deceased.

"If you believe from the evidence that the defendant had reason to believe, and did believe that he was in danger of his life, or of receiving great bodily harm, and you further believe that it also appeared to defendant's comprehension, as a reasonable man, that to avoid such danger it was necessary for him to take the life of John C. Sullivan, such killing would be in self-defense, and you should acquit the defendant."

Thus the jurors were instructed, as the statute provides, that one of the necessary elements of justification was that he did so believe.

We are entirely satisfied that for the purpose of showing the condition of his mind at the time, and to establish one of the necessary conditions of justification, defendant had the right to answer the question objected to, and that it was for the jury to consider it like all other testimony proper to be given in the case.

In *People v. Farrell* (31 Cal. 576), the court say: "The rule that the intent must be inferred from the acts and words of the party had its foundation in necessity created by the rule which excluded parties in interest from the witness stand. That necessity is now removed by the abroga-

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tion of the rule which created it, and the legal tenet that actions must speak for themselves, and words furnish their own interpretation is much modified, if not wholly abrogated, by the recent innovation upon the common law by which parties are allowed to testify in their own behalf. Before that time, there was no way of ascertaining the motives and intentions of parties, except by inference from their acts and sayings, and all experience shows that they may frequently, if not at all times, prove very imperfect guides. * * * It is no answer to say that this enables a party to substitute a false motive for a true one, or to convert words spoken in one sense into another. If the argument proves anything, it proves too much, and shows that the radical change which has been made is in all respects founded in folly rather than wisdom. For the truthfulness of parties when upon the witness stand, we must depend, as in the case of other witnesses, upon the obligation of their oaths, and their reputation for truth and veracity. If these can be relied upon for the truth of statements made in reference to acts and words of which the eye and ear may take notice, they may, for the same reason, be accepted as guarantees for the truth of statements made in respect to motives and intents of which the mind or inner man alone can take cognizance. Nor is there, in our judgment, any well-grounded reason for apprehending that this rule will obstruct rather than advance the ends of justice. There is no more danger of imposing upon the jury falsehood or pretense, in respect to motives and intents, than there is of doing the like in respect to visible or external circumstances. The jury can as readily distinguish between the false and true in respect to the former as the latter. If the motive or intent assigned is inconsistent with the external circumstances, it must be discarded as false. If, on the contrary, they are consistent, there is no reason why they may not be true." (*State v. Stewart*, 9 Nev. 132; *People v. Williams*, 32 Cal. 285; 1 Bish. Crim. Law, 6th ed., sec. 305.)

For this error, the judgment of the court below is reversed, and a new trial ordered.

Argument for Appellant.

[No. 845.]

THE STATE OF NEVADA, RESPONDENT, v. WILLIAM THOMPSON, INDICTED BY THE NAME OF HARRY HUFF, APPELLANT.

INDICTMENT—MURDER IN THE FIRST DEGREE—WILLFUL, DELIBERATE AND PREMEDITATED.—In order to sustain a conviction of murder in the first degree, it is not essential that the indictment should state the words “willfully, deliberately and premeditatedly,” in addition to the words “unlawfully and with malice aforethought.”

INSANITY AND INTOXICATION.—Instructions given by the court to the effect that temporary insanity produced by intoxication does not destroy responsibility if the party, when sane and responsible, made himself voluntarily intoxicated: *Reviewed*, and held to be correct.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts appear in the opinion.

L. A. Buckner, for Appellant:

I. The indictment only charges murder in the second degree. When an indictment charges that the offense was committed in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, it is immaterial to show that the intention was to kill. The statement of the facts constituting either of the above-named public offenses, with the additional fact that death was the result of their commission, the law exclusively presumes the intent was to commit murder in the first degree. In the other classes specifically mentioned, to wit: *poison, torture and lying in wait*, the words *ex vi termini* charge murder in the first degree, whilst all other kinds of murder *of the first degree* can only be sufficiently charged by the use of the technical phrase “willful, deliberate and premeditated.”

This subject is elaborately discussed by Bishop, in his work on criminal law. (Sections 797 *et seq.*)

The opinion in the *State v. Millain*, 3 Nev. 409; does not correctly state the law. The reasoning of the court is not sound; still, the indictment in that case might have been sustained without denying the correctness of the position here contended for, as the indictment stated that Millain

Argument for Appellant.

killed Bulette "by choking and strangling" her, thus showing that the murder was committed by *torture* and necessarily implied that it was willful, deliberate and premeditated.

It is a necessarily logical deduction that where a public offense has been divided into degrees, in order to convict of the greatest, you must state the facts to show that degree. If the indictment is for "larceny" a conviction of "grand larceny" cannot be had unless the value of the property charged as having been stolen is stated to be fifty dollars or over, and so of all the offenses marked off into degrees.

If, when the legislature divided murder into degrees, it had designated murder in the second degree by some other name, as had been done in relation to manslaughter, then no difficulty would ever have occurred, for there is just as marked distinction between the crime in the first and second degree as between it in the second degree and manslaughter. The intent and act are as different as in murder of the second degree and manslaughter. It was a necessity to require the jury to find the degree, so long as the general denomination murder was used for both offenses. (Cr. Pr. Act, sec 412.)

The legislature has no right to prescribe a form of indictment dispensing with the necessity of complying in substance with the constitutional rights of persons defined in the declaration of rights. Nor did it do so for the act (Criminal Proceedings) carries out those provisions, which are identical with those of the common law. (Comp. L. 682; 5 T. R. 611, 623.)

The indictment ought to be certain to every intent and without any intendment to the contrary. (Cro. Eliz. 490; Cro. Jack. 20.) Every crime must appear on the face of the record with a scrupulous certainty (1 Cold. 187), and every averment must be so stated that the party accused may learn the general nature of the crime of which he is charged, and who the accusers are whom he will be called to answer. (1 T. R. 69.) The offense must be positively charged, and not stated by way of recital. (2 Stra. 900, notes 1, 2, Lord Raym, 1363.)

Argument for Respondent.

The indictment must charge the offense in the words of the statute. (*People v. Logan*, 1 Nev. 110; *People v. Dolan*, 9 Cal. 576; *Frazer v. The People*, 54 Barb. 306; *People v. Stockton*, 1 Parker, 424; *Thompson v. The People*, 3 Parker, 208; *People v. Allen*, 5 Denio, 74.)

John R. Kittrell, Attorney-General, for Respondent:

I. The indictment follows the statutory form *in hæc verba*, and has been held to be sufficient by this court repeatedly. (*State v. Millain*, 3 Nev. 409; *State v. Anderson*, 4 Id. 265, Crim. Pr. Act. sec. 235.)

In an indictment for murder, it is not necessary that the indictment should specifically aver that the killing was "willful, deliberate and premeditated." It is sufficient to charge the crime in the words of the statute. (*People v. Dolan*, 9 Cal. 576; *People v. Murray*, 10 Id. 309.)

The indictment charges the defendant generally with the commission of the crime of murder. There is no such thing under the criminal code of this state, or in any criminal practice act, as charging murder in the several degrees of that offense. "Murder," is a generic term and embraces both murder in the first and second degrees, and where the jury designate by their verdict the degree in which they find a defendant guilty, it is all the law requires under our system.

An indictment for murder should not state or designate the degree of murder. (*People v. Lloyd*, 9 Cal. 54; *People v. King*, 27 Id. 507.)

On the trial of this case an attempt appears to have been made at a defense on these grounds: First. That the deceased committed suicide; Second. That the defendant was insane at the time of the commission of the homicide. Third. That from habits of long continued drunkenness, he was incapable of forming that deliberate and premeditated intent to kill, that is requisite to constitute the crime of murder in the first degree.

There is nothing whatever in the evidence which tends to show that it was a case of *felo de se*. On the contrary, there is an abundance of testimony going to show, and sufficient

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to convince the commonest understanding that McRavy came to his death by a pistol-shot fired from the hand of the defendant, and that it was discharged with an intent to take the life of his victim.

II. The instructions relative to insanity, correctly state the law. (*People v. Williams*, 43 Cal. 345; *United States v. Drew*, 1 Lead. Case, (crim.) 131; *United States v. McGlue*, 1 Curtis C. C. 1; *Lawton v. Sun Mut. Ins. Co.*, 2 Cush, 500; *Cornwall v. State*, Martin & Yer. 147-49.

By the Court, LEONARD, J.:

Appellant was indicted for killing one William McRavy, on or about January 2, 1877, in Humboldt county, in this State, and was convicted of murder in the first degree. By his counsel, he moved in arrest of judgment on the ground that the indictment did not comply with the provisions of section 286 of the criminal practice act, in this: "The statement of the acts charged in the indictment does not constitute the offense of murder in the first degree, because it is not stated that the defendant feloniously killed William McRavy, a human being, with malice aforethought, deliberately and premeditatedly. The facts stated in the indictment do not constitute a public offense, because it is not charged the killing was done with felonious intent, and it is not stated that William McRavy was a human being, and it does not so appear from the indictment." This motion was denied by the court and exception taken. Defendant also moved the court to grant a new trial on the grounds, first, that the verdict was contrary to law and evidence; second, that the court misinstructed the jury in matters of law excepted to on the trial.

This appeal is taken from the judgment and the order overruling appellant's motion for a new trial.

The several grounds of error presented on motion in arrest of judgment and for new trial are urged by appellant on appeal.

The charging part of the indictment was as follows:

"Defendant, Harry Huff, above named, is accused by the grand jury of the county of Humboldt, State of Nevada,

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of the crime of murder, committed as follows: The said Harry Huff, on the second day of January, A. D. 1877, or thereabouts, at the county of Humboldt, State of Nevada, and before the finding of this indictment, without authority of law, and with malice aforethought, did then and there kill and murder one William McRavy, by shooting him with a pistol commonly called a revolver, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nevada."

First. Counsel for appellant claims this indictment is insufficient to sustain the judgment of murder of the first degree, for the reason that it does not contain the words "willfully, deliberately and premeditatedly," in addition to the words "unlawfully and with malice aforethought;" that because of the failure to insert said words the indictment charges only murder of the second degree; and that, therefore, the judgment of the court is erroneous.

It is a well-established principle of the criminal law "that a want of averment cannot be helped by evidence, and that a jury cannot convict a person of any crime, however clearly it may be proved, unless it is duly and technically set forth in the indictment." It follows that if this indictment does not charge murder of the first degree it will not sustain the judgment. Does this indictment, then, in proper words, duly charge the crime of murder of the first degree?

Under the statute, "murder is the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned." "All murder which shall be perpetrated by means of poison, lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, shall be deemed murder of the first degree; all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their

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verdict whether it be murder of the first or second degree.” (Secs. 2321, 2323, C. L.)

This indictment contains all that the statutory form requires, and much besides. In fact, counsel for appellant do not urge any other faults against it than those above stated. It charges the crime of murder, substantially, as that crime was defined at common law, and according to the statutory definition. This court has decided that the power of the legislature to mold and fashion the form of an indictment is plenary, but that its substance cannot be dispensed with. (*State v. O'Flaherty*, 7 Nev. 157.)

Is this indictment lacking in any material allegation necessary to support a judgment of murder of the first degree?

The substantial, essential facts necessary to be found by the grand jury, and stated in the indictment, are these: “The indictment must be direct and certain, as it regards: First. The party charged; Second. The offense charged; Third. The particular facts of the offense charged, so far as necessary to constitute a complete offense, but the evidence tending to prove the charge need not be stated.” (C. L. sec. 1860.)

“The indictment shall be sufficient if it can be understood therefrom: First. That it is entitled in a court having authority to receive it, though the name of the court be not accurately set forth; Second. That it was found by a grand jury of the district in which the court was held; Third. That the defendant is named, or, if his name cannot be discovered, that he be described by a fictitious name, with a statement that he has refused to discover his real name; Fourth. That the offense was committed at some place within the jurisdiction of the court; Fifth. That the offense was committed at some time prior to the finding of the indictment; Sixth. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended; Seventh. That the act or omission charged as the offense is stated with such a degree of certainty as to enable

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the court to pronounce judgment upon a conviction according to the weight of the case." (C. L. sec. 1867.)

If this indictment is in any manner faulty, it must be in failing to fill the requirements of the sixth and seventh subdivisions of the section last quoted.

Although the questions presented by counsel for appellant, as to the sufficiency of this indictment to support the judgment rendered, have been passed upon substantially by former decisions of this court, with the conclusions of which as to the sufficiency thereof we agree, still, the same being again persistently and ably presented, we have carefully re-examined the objections of counsel for appellant, and our investigations have only confirmed us in the correctness of the opinions heretofore entertained by this court; that an indictment like this is sufficient, both in form and substance.

Under the common law an unlawful killing of a reasonable creature in being, in the peace of the State, with malice aforethought, by a person of sound memory and discretion, was murder, and the punishment therefor was death. Under the statute a commission of the same act, in like manner and with the same intent, completes the crime of murder. True, the statute has divided the same offense into two degrees, but the result of this is not the creation of a new offense. The general definition of murder in the statute includes both degrees, the same as at common law it included all cases of felonious homicide, not only where the murder was perpetrated by means of poison, or lying in wait, torture or by any other kind of willful, deliberate and premeditated killing, etc., but also those cases where the killing was not characterized by any particular atrocity, or by deliberation or premeditation. The division of the offense into two degrees, and declaring that a murder perpetrated by certain means and with a certain intent should be murder of the first degree, and that all other murder should be murder of the second degree, is simply and only a guide for the jury in arriving at their verdict from the evidence, under the instructions of the court. Nor was it necessary that the act with which appellant was charged should be more clearly or distinctly set forth, in order to

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enable a person of common understanding to know what was intended. He knew if he pleaded "not guilty" that the jury, if they found him guilty, must and would find the degree; and that if he plead guilty by confession in open court, the court must and would proceed, by examination of witnesses, to determine the degree of the crime and give sentence accordingly. Such is the duty of the court and jury in every charge of murder, regardless of the degree. If the theory of counsel for appellant be true, why, then, in case of confession, does the statute require the court to ascertain the degree from the evidence of witnesses, even though the defendant is charged with murder in the second degree only? It being undeniably true that a person cannot be convicted of this crime without being first duly charged therewith by indictment, what possible reason can be given for requiring of the court so useless an act, in case of confession, as the taking of testimony in order to ascertain the degree, when, if he is charged with only murder in the second degree, he cannot in any event be convicted for any higher grade? And, too, in such case, why require the jury to find the degree, when the only degree they could find would be the second? If the theory of counsel for appellant be true, we can only escape convicting the legislature of utter foolishness by concluding that all indictments for murder must charge murder of the first degree, which, according to counsel's theory, can be done only by alleging deliberation, premeditation, lying in wait, etc. Suppose it should be decided by this decision, and become the established law of the state, that this indictment, and all like it, charge only murder of the second degree. Thereafter the second degree could be charged by following this as a precedent. In such case, if the state should not deem a certain defendant guilty beyond the second degree, the district attorney should and would follow this form; and yet, in the same case, the court or jury would be obliged to go through with the useless farce of finding the degree, when only one, that is the second, could possibly be found.

It has been decided, in numerous cases, that an indictment for murder should not designate the degree; that the trial jury, and not the grand jury, should determine it, and

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that the former should not be embarrassed by the opinion of the latter. (*People v. King*, 27 Cal. 512.)

If that be so, why is it necessary or proper to use words which, with the same certainty, indicate the degree?

We are satisfied that, under our statute, an indictment for murder, which charges the crime according to the common law form, is sufficient to sustain a judgment for either degree, and that the legislature so intended. And such is the view entertained by the great weight of authorities in states whose statutes are similar to ours. (*Wicks v. Commonwealth*, 2 Va. cases, 390; *Mitchell v. State*, 8 Yerg. 525; *Id.*, 5 Yerg. 345; *White v. State*, 16 Tex. 206; *Wall v. State*, 18 Tex. 682; *Gehrke v. State*, 13 Tex. 586; *Bull's case*, 14 Gratton, 620; *Livingston's case*, 14 Gratton, 596; *White v. Commonwealth*, 6 Binney, 182; *Hines v. State*, 8 Humph. 598; *People v. White*, 22 Wend. 175; *People v. Enoch*, 13 Wend. 159; *People v. Cronin*, 34 Cal. 191; *People v. Dolan*, 9 Cal. 576; *People v. Murray*, 10 Cal. 309; *State v. Anderson*, 4 Nev. 273; *McAdams v. State*, 25 Ark. 416; *Green v. Commonwealth*, 12 Allen, Mass. 170.)

On the contrary, it has been held, in Iowa, Indiana, Ohio and Missouri, under statutes something different from ours, that an indictment which simply charges the homicide to have been committed with malice aforethought, without charging a premeditated design, or lying in wait, torture, etc., will not support a conviction of murder in the first degree. (*Fouts v. State*, 4 G. Greene, Iowa, 500; *State v. McCormick*, 27 Id. 402; *Finn v. State*, 5 Ind. 400; *Fouts v. State*, 8 Ohio, 98; *State v. Jones*, 20 Mo. 58.) We are satisfied with the reasoning of the former decisions, and adopt their conclusions. They greatly outnumber the latter class and sustain the evident intention of the legislature, without infringing the rights of the accused.

Second. Appellant next urges that the verdict is contrary to the evidence. There was testimony tending to show not only that defendant committed the homicide at the time and place stated in the indictment, but also that he committed it with premeditation and deliberation. An effort was made by the defense to show that deceased com-

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mitted suicide; that defendant was insane and that he was drunk at the time. There was no proof tending to establish the fact of suicide; none to show insanity at the time, beyond that which is the immediate effect of excessive drinking. On the contrary, there was the testimony of many witnesses who saw the defendant for days prior to the homicide, establishing the fact that he was at all times conscious of his acts and knew good from evil. Under such circumstances we need not repeat what has been so often decided by this court, that upon this ground the judgment of the court below will not be reversed.

Third. Appellant claims that the court misinstructed the jury in a matter of law, in this: At the instance of defendant's attorney the court instructed the jury as follows: "In every crime or public offense there must be a union or joint operation of act and intention or criminal negligence. That intention is manifested by the circumstances connected with the perpetration of the offense and the sound mind and discretion of the person accused. A person shall be considered of sound mind who is neither an idiot nor a lunatic, or affected with insanity, and who hath arrived at the age of fourteen years, or before that age, if he knows the distinction between good and evil. Drunkenness shall not be an excuse for any crime, unless such drunkenness be occasioned by the fraud, contrivance or force of some other person or persons, for the purpose of causing the perpetration of an offense."

At the instance of the district attorney, the court gave the following instruction to the jury:

"It is a well-settled rule of law that drunkenness is no excuse for the commission of a crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the pur-

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pose of determining the degree of the crime, and for this purpose it must be received with caution." Counsel for appellant urge that the last instruction conflicts with the former upon the question of insanity. We do not think so. The first treats of settled insanity, the last of temporary insanity produced immediately by intoxication.

An eminent writer upon criminal law thus states the established principles upon this subject:

"Settled insanity, produced by intoxication, affects the responsibility in the same way as insanity produced by any other cause. Temporary insanity, produced immediately by intoxication, does not destroy responsibility where the patient, when sane and responsible, made himself voluntarily intoxicated. While intoxication *per se* is no defense to the fact of guilt, yet, when the question of intent or premeditation is concerned, evidence of it is material for the purpose of determining the precise degree." (Wharton on Homicide, sec. 587 *et seq.*)

Another author says: "When a man voluntarily becomes drunk, there is the wrongful intent; and if, while too far gone to have any further intent, he does a wrongful act, the intent to drink coalesces with the act done while drunk, and for this combination of act and intent he is liable criminally. It is, therefore, a legal doctrine, applicable in ordinary cases, that voluntary intoxication furnishes no excuse for crime committed under its influence. It is so, even, when the intoxication is so extreme as to make the person unconscious of what he is doing or to create a temporary insanity." (Bishop's Crim. Law, sec. 400.)

In *United States v. McGlue* (Curtis' C. C., vol. 1, p. 13), the court say: "If a person suffering under delirium tremens is so far insane as I have described to be necessary to render him irresponsible, the law does not punish him for any crime he may commit. But if a person commits a crime under the immediate influence of liquor, and while intoxicated, the law does punish him, however mad he may have been." (*Cornwall v. State*, 4 Cooper's Ed. Tenn. 496.)

The testimony in this case shows that appellant, prior to January 2, 1877, drank very considerably, and sometimes

Points decided.

excessively, for several years; that a year or two before that time he had the delirium tremens. But there is no testimony tending to show that he was so afflicted at the time of, or within two years before the death of McRavy. All the testimony shows that he drank so much as to be under the influence of liquor for several days prior to January 2, and on that day he was so affected. The testimony further shows that prior to the homicide he was conscious of what he did, although under the influence of liquor. Under such circumstances, any instruction upon insanity, beyond that which is the immediate effect of intoxication, would have been improper, and would have been harmless had it been given, because there was no evidence to which it could have applied.

Temporary insanity produced by intoxication does not destroy responsibility if the party when sane and responsible made himself voluntarily intoxicated. We are satisfied the jury must have understood the instruction in that sense, and that under the testimony it made no difference if they did not.

This instruction was copied verbatim from one given in the case of *People v. Lewis* (36 Cal. 531), and also in *People v. Williams* (43 Cal. 345), and it was declared correct in each case.

We think the instructions, taken together, fairly presented the law of the case.

Finding no error on the part of the court below, its order and judgment are affirmed, and the district court is directed to carry its sentence into execution.

[No. 799.]

ABRAHAM BANTA, RESPONDENT, v. L. C. SAVAGE,
APPELLANT.

FRAUDULENT REPRESENTATIONS—ADMISSIONS IN ANSWER.—In an action to recover damages for alleged false and fraudulent representations in the sale of land, the plaintiff, among other things, alleged that defendant represented that all the waters of Thomas creek “belonged to him, to use and appropriate as his own,” upon the Geller ranch; that said representations were false, and were made to deceive plaintiff, and to induce him

Argument for Appellant.

to purchase said ranch. The defendant in his answer denied that he ever made any such representations, and, among other things, alleged that no water, water rights, or privileges of any kind were mentioned in his deed to plaintiff, "nor were they appurtenances of said ranch or land:" *Held*, that the plaintiff, under the pleadings, was not required to offer any proof that the waters of Thomas creek did not belong to, or were not appurtenant to the Geller ranch, and that the defendant was estopped by the averments and admissions in his answer from relying upon any such defense.

REPRESENTATIONS WHEN FRAUDULENT.—No representations, however false, amount to a fraud in law, unless it be of a fact, which fact is material to the contract or transaction.

IDEM—EXPRESSIONS OF OPINION OR FACT.—The mere expression of an opinion which does not involve the assertion of a fact, although the opinion be incorrect, will not make the person expressing it liable in an action for false and fraudulent representations.

IDEM—PROVINCE OF A JURY. — It was the province of a jury, under the facts and circumstances of this case, to decide whether the representations as made by defendant were intended as the statement of a fact and whether they were so received and acted upon by defendant, or were mere expressions of opinion.

APPEAL from the District Court of the Second Judicial District, Washoe county.

The facts are sufficiently stated in the opinion.

R. M. Clarke, for Appellant:

I. The court erred in denying the second instruction asked by the defendant. What defendant expressed was a mere opinion for which he is not responsible in law. (2 Pars. on Cont., 275-76, notes j k; 1 Story on Cont., sec. 637; *Long v. Woodman*, 58 Maine, 52; *Holbrook v. Conner*, 60 Maine, 578; *Cooper v. Lovering*, 106 Mass. 77; *Mooney v. Miller*, 102 Mass. 217.

II. The court erred in denying defendant's fourth instruction. If the water of Thomas creek below the Bowker ranch, in fact belonged to the Geller ranch, and the plaintiff suffered the farmers above to divert it, and deprive him of its use, then he can have no action. It was not the defendant's duty to make the water flow to plaintiff's land or to protect his estate against trespassers.

III. The court erred in denying defendant's fifth and giving plaintiff's first instruction. The answer is not an admission that the waters of Thomas creek do not belong

Argument for Respondent.

to the Geller ranch; because Thomas creek is a natural watercourse, and as such is not "appurtenant" but "parcel" of the land. (*Vansickle v. Haines*, 7 Nev. 266; Angell on Watercourses, secs. 6, 8, 9, 92.)

Furthermore, the cause was tried upon the theory that it was a vital issue whether Thomas creek belonged to the ranch or not, and upon this issue proofs were admitted and arguments made. And the rule established after the case was closed, and when too late to amend, was a surprise and injury to the defendant which the court ought not to tolerate.

Ellis & King, for Respondent:

I. The declaration of the defendant to the plaintiff, that there was water enough or plenty of water to irrigate the ranch at any time, or to flood the ranch in two hours, was not the mere expression of an opinion. There is nothing problematical or conditional in it. The existence of a fact was the subject of conversation and of inquiry; that fact was the most natural one to be ascertained. Upon the existence of a state of facts, as by the defendant asserted, a bargain was to be effected. That state of facts was not only asserted to exist at all times, but was then illustrated by defendant.

In all respects this declaration is unlike the giving of a mere opinion. It is not the language of "*puffing*." (1 Story on Contracts, sec. 637, note 2, and cases cited; as to whether this was merely the expression of opinion, 18 Vt. 176; 1 Story on Contracts, sec. 636, note 3, and cases cited; 1 Parsons on Contracts, 578.)

II. The court did not err in refusing the fourth instruction of the defendant which is assigned as error. The pleadings settle this question. It is asserted in the answer, that the waters of Thomas Creek do not belong to the Geller ranch, so, also, the complaint alleges. There is in the answer no denial of this allegation in the complaint. (15 Cal. 638; 12 Cal 403.) As to the admissions in the answer, and their effect against general denials therein contained: *Fremont v. Seals*, 18 Cal. 434.

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By the Court, HAWLEY, C. J.:

This is an action to recover damages for alleged false and fraudulent representations of and concerning certain water rights, privileges and appurtenances, represented by defendant as belonging to the Geller ranch. The facts material to be considered, as testified to by plaintiff, may be briefly stated as follows:

The plaintiff Banta came to Washoe county a stranger, desirous of purchasing a farm. Hearing that the defendant Savage wished to sell the land known as the "Geller ranch," he went to see him, and after making known his errand, the defendant exhibited his title papers and said "that all the waters of Thomas creek below the Bowker ranch belonged to the Geller ranch." In proof of this statement he read the deed from Geller to him, and called plaintiff's particular attention to this clause: "The party of the first part herein conveying to the party of the second part all his right, title and interest in and to the water of the Thomas creek, after the same leaves the ranch known as the Bowker ranch." The parties then went upon the land and continued talking about the water for irrigation. The defendant told plaintiff "there was water enough to flood the ranch in two hours at any time."

After these statements the defendant conducted plaintiff to Dry creek (the plaintiff supposing it from previous conversations to be Thomas creek), and pointed out a ditch leading from a dam in the creek, which he said conducted the water to the ranch. No water was running in the ditch, it being out of repair. There were about seventy-five inches of water running in the creek, which the defendant said would increase when the farmers above began to use water for irrigation from the Truckee river. Dry creek is not upon the land sold to plaintiff; Thomas creek is.

In traveling over the land the parties crossed Thomas creek; there was no water running in it at the time. Plaintiff did not know that it was Thomas creek, and the defendant did not point it out as such.

The plaintiff, relying upon the representations of defend-

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ant, that there was water enough belonging to the land to irrigate it, bought the property for forty-five hundred dollars. The deed from defendant to plaintiff conveys the land "and appurtenances," but does not mention any water, water rights or privileges.

The testimony upon the part of plaintiff, at the trial, tended to show that all the representations made by defendant were false; that defendant knew them to be false; that the plaintiff was induced to purchase the land, believing them to be true, and that he had been damaged in consequence thereof.

The jury found a verdict in favor of the plaintiff for six hundred dollars, and defendant appeals.

Upon the trial defendant introduced evidence tending to prove that the waters of Thomas creek below the Bowker ranch did belong to the Geller ranch, and that the farmers above the Geller ranch had diverted the water and deprived the plaintiff of its use. But the court, at the request of plaintiff's counsel, notwithstanding the fact that such evidence had been introduced without objection, instructed the jury "that the parties by their pleadings in this action admit that the waters of Thomas creek do not belong to and are not appurtenant to the Geller ranch or the land described in the complaint," and refused to give the fourth and fifth instructions asked by defendant. We think the action of the court in this respect was correct.

It is alleged in the complaint that the defendant represented that the waters of said Thomas creek "belonged to him, to use and appropriate as his own at all times for irrigation upon said ranch," and that the right and title thereto was in him. It is averred that said representations about said water and the use thereof, and the ownership thereof were false and fraudulent, and were made by defendant to deceive plaintiff and to induce him to purchase said ranch.

The defendant in his answer denies that he ever made any such representations, and for affirmative matter alleges: "That at the time mentioned in the complaint, and for the consideration therein mentioned he bargained with the said plaintiff to sell him the Geller Ranch and other land de-

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scribed in the complaint, and gave him (plaintiff) a quit-claim deed or deeds, therefor; that no water, water rights or privileges of any kind were mentioned in said deed, or deeds, to plaintiff, nor were they appurtenances of said ranch or lands, defendant thereby selling the right, title and interest in and to said lands which he himself had, and that plaintiff took and could take no other."

After a careful examination of all the averments in the complaint and answer, which are unnecessarily lengthy and very carelessly drawn, we are of opinion that the plaintiff, under the pleadings, was not required to offer any proof that the waters of Thomas creek did not belong to or were not appurtenant to the Geller ranch, and that the defendant was estopped by the averments and admissions in his answer from relying upon any such defense.

As the defendant did not ask leave of the court to amend his answer in this respect, he must be bound by his own positive averments. (*Blankman v. Vallejo*, 15 Cal. 645.)

It follows, therefore, that the court did not err in giving the first instruction asked by plaintiff, and refusing to give the fourth and fifth instructions asked by defendant.

The court did not err in refusing to give the second instruction asked by defendant. It reads as follows: "The jury are instructed that no representations, however false, amount to a fraud in law unless it be of a fact, which fact is material to the contract or transaction; that the mere expression of an opinion, which opinion does not involve the assertion of a fact, although the opinion be incorrect, will not make the person expressing the opinion liable in an action for false and fraudulent statements; and that the statements alleged to have been made by Savage to Banta, to wit; that there was water enough, or plenty of water, to flood or irrigate the land, is not such a statement as will support this action or entitle the plaintiff to recover, if, in fact, such statement was made and is false."

The first and second clauses in the instruction are correct, but the last is erroneous in this: that it infringes upon the province of the jury, whose duty it was, under all the facts and circumstances of this case, to decide whether the

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representations as made by defendant were intended as the statement of a fact, and whether they were so received and acted upon by defendant, or were mere expressions of opinion.

Story, in his work on contracts, in discussing the various questions presented by the misrepresentations of the vendor, lays down the rule as follows: "If the seller fraudulently misrepresents facts, or states facts to exist which he knows not to exist, his fraud would vitiate the contract, provided the misstatements were in respect to a material point." (Section 636.) But where a statement is not made as a fact, but only as an opinion, the rule is quite different. Thus a false representation as to a mere matter of opinion * * * does not avoid the contract. * * * Ordinarily, a naked statement of opinion is not a representation on which a buyer is legally entitled to rely, unless, perhaps, in some special cases where peculiar confidence or trust is created between the parties. The ground of this rule is, probably, the impracticability of attempting to discover by means of the rules of law the real opinion of the party making the representation, and also because a mere expression of opinion does not alter facts, though it may bias the judgment. Mere expressions of opinion are not, therefore, considered so tangible a fraud as to form a ground of avoidance of a contract, even though they be falsely stated. * * * Yet, where a representation is made, going to the essence of a contract, the party making it should be careful to state it as an opinion, and not as a fact of which he has knowledge, or he may be liable thereon. The question whether a statement was intended to be given as an opinion, and was so received, is, however, one for a jury to determine, upon the peculiar circumstances of the case. But whenever a belief is asserted, as in a fact, which is material or essential, and which the person asserting knows to be false, and the statement is made with an intention to mislead, it is fraudulent and affords a ground of relief." (Section 637.)

Now, in this case, it was not only the duty of the jury to consider all the statements made by the defendants,

Points decided.

while upon the ranch, concerning the water, but they were also authorized to take into consideration his conduct as well as his representations, and to determine from all the facts and circumstances whether or not his representation "that there was water enough to flood the ranch in two hours" was made as a mere expression of an opinion, or was a statement of a fact that was calculated and intended to deceive and mislead the plaintiff. "The common law does not oblige a seller to disclose all that he knows which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself, or to require a warranty. He may be silent and be safe; but if he be more than silent; if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inquiry, this becomes a fraud, of which the law will take cognizance. The distinction seems to be, and it is grounded upon the apparent necessity of leaving men to take some care of themselves in their business transactions, the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself." (1 Par. on Con. 578.)

The second instruction asked by plaintiff and given by the court is unobjectionable.

The judgment of the district court is affirmed.

[No. 806.]

H. P. PHILLIPS, PLAINTIFF, v. WILLIAM WELCH ET AL., DEFENDANTS. E. D. SWEENEY, PETITIONER.

CONTEMPT—SUFFICIENCY OF AFFIDAVIT.—The affidavit alleging that Sweeney had violated the decree in the case of *Phillips v. Welch*: reviewed and held sufficient to give the court jurisdiction of the subject-matter of the contempt, and of the person of the petitioner.

INQUIRY UPON CERTIORARI.—The inquiry upon the writ of certiorari cannot be extended any further than is necessary to determine whether the inferior tribunal has exceeded its jurisdiction, or has regularly pursued its authority.

IDEM—EXCESS OF JURISDICTION.—Error in judgment, in respect to a ques-

Statement of Facts.

tion which the court is authorized to investigate and determine, does not constitute an excess of jurisdiction.

IDEM—AUTHORITY OF SUPREME COURT.—Whenever the inferior tribunal has regularly pursued its authority, and has not, in any respect, exceeded its jurisdiction, the authority of the supreme court in this proceeding ceases; it cannot correct any errors of law or fact not jurisdictional in their character.

CONTEMPT—HABEAS CORPUS—JURISDICTION.—When a court commits a party for a contempt, its adjudication is a conviction, and its commitment, in consequence, is execution; and no court can discharge on habeas corpus a person that is in execution by the judgment of any other court having jurisdiction of the subject-matter of the contempt.

CERTIORARI—STATUTES CONSTRUED.—In construing sections 1497 and 1503, vol 1, Compiled Laws: *Held*, that the words “has exceeded the jurisdiction of such tribunal,” and “regularly pursued the authority of such tribunal,” present substantially the same idea, and under neither section can any question be inquired into or decided, except that of jurisdiction.

IDEM—JURISDICTION—CONTEMPT.—Jurisdiction as applied to any particular claim or controversy is the power to hear and determine that controversy, and where a person is charged with violating the decree of a court, no other court, except the one rendering the decree can hear or determine the controversy, or punish such person if found guilty of a contempt.

CONTEMPT—JUDGMENT OF CONVICTION FINAL AND CONCLUSIVE.—A contempt of the character alleged in this proceeding is a specific substantive and distinct criminal offense, and under the constitution and laws of this state, judgment of conviction, if within the jurisdiction of the inferior court, is final and conclusive.

NO EXCESS OF JURISDICTION.—The facts of this case elaborately reviewed: *Held*, that the court, in adjudging petitioner guilty of a contempt, in violating the decree and order in the suit of *Phillips v. Welch*, did not exceed its jurisdiction, and that this court cannot, upon the writ of certiorari, review the case upon the merits. (BEATTY, J., *dissenting*.)

ORIGINAL application for a writ of certiorari.

The affidavit for the writ of attachment against the defendant Sweeney for contempt (referred to in the opinion), was presented to the district court on the thirtieth of July, 1875. Sweeney appeared and demurred to the sufficiency of the affidavit. The demurrer was overruled, and defendant Sweeney then filed an answer denying most of the allegations contained in the affidavit. A hearing was had, and witnesses were sworn and examined touching the disputed questions. The court, after the hearing, found the facts as

Argument for Petitioner.

stated in the opinion of the court. The judgment of the court adjudging Sweeney guilty of contempt, and entering a fine of one hundred dollars against him, was rendered August 17, 1875. From this judgment an appeal was taken to the supreme court, and there dismissed for want of jurisdiction. (11 Nev. 187.) Defendant Sweeney having (as was claimed by plaintiff), continued to violate the decree, was thereafter, to wit, in July, 1876, brought before the court, and fined in the sum of five hundred dollars. The defendant Sweeney thereupon presented to this court a petition alleging, among other things, that in adjudging him guilty of contempt, "said court exceeded its jurisdiction, and that the decision of said court, in said proceeding, was contrary to and against the evidence adduced before said court, and contrary to and against law." Upon the presentation of this petition, counsel agreed in open court that the transcript on appeal in *Phillips v. Welch* (11 Nev. 187), should be considered and treated as a return of the district court to the writ of certiorari.

C. H. Belknap, for Petitioner:

I. A party cannot be adjudged guilty of contempt for doing an act which he is not forbidden to do. (*Weeks v. Smith*, 3 Abbott's Prac. Rep. 211.)

If the order be ambiguous or doubtful, or fairly capable of a construction which will be consistent with the person's innocence of any intentional disrespect, the court should not interfere to punish for a contempt. Injunction orders should be made so clear, definite and precise, that every person enjoined should see clearly and distinctly just what acts are enjoined, and what are permitted.

II. The affidavit of Phillips, upon which the contempt proceeding is founded, does not state facts sufficient to give the district court jurisdiction of the subject matter. (*Batchelder v. Moore*, 42 Cal. 414.) It abounds in legal conclusions; it does not state a single fact by which the district court could have been informed whether a contempt had, or had not, been committed. The fact which should have been stated was the *quantity* of water, the fractional portion of

Argument for Respondent.

the stream, that Sweeney was actually diverting; then the district court, from such statement, could have determined whether, upon the facts stated, Sweeney was violating the decree. The affidavit of Phillips does not state facts sufficient to give the district court jurisdiction of the case of contempt. The jurisdictional facts not appearing, this court can, upon certiorari, unquestionably review the action of the district court, and determine whether it had jurisdiction of the matter. (*Pindar v. Black*, 4 How. Prac. 95; *Crandall v. Bryan*, 15 How. Prac. 48; *Whitlock v. Roth*, 5 How. Prac. 143; *DeNierth v. Sidner*, How. Prac. 419; *Vanderpool v. Kissam*, 4 Sandford, 715; *Blason v. Bruno*, 21 How. Prac. 112; *City Bank v. Lumley*, 28 How. Prac. 397; *Cook v. Roach*, 21 How. Prac. 152; *Draper v. Beers*, 17 Abbott Pr. 163; *Lippman v. Petersburg*, 10 Abbott Pr. 254.)

Sections 1497 and 1503 (compiled laws) must be considered together, and effect must be given to each, if possible; so considered, it seems clear, under the statute, that the first question to determine is under section 1497, whether the inferior tribunal had jurisdiction; and secondly, whether it has regularly pursued its authority.

In cases where petitioner has no other remedy, and where injustice would otherwise be done, the court will examine the regularity of the proceeding of the inferior tribunal, and determine whether its decision is in accordance with law. (*Swift v. Poughkeepsie*, 37 N. Y. 516; *People v. Assessors*, 39 N. Y. 88; *People v. Supervisors*, 51 N. Y. 442; *People v. Allen*, 52 N. Y. 538; *People v. Betts*, 55 N. Y. 600; *People v. Sanders*, 3 Hun. N. Y. 16; *Niblo v. Post*, 25 Wend. 280.)

These decisions were based upon the common law.

Our statute is in affirmance of the common law. (*Whitney v. Board of Delegates, &c.*, 14 Cal. 500.)

Robert M. Clarke, for Respondent:

I. The relief sought can only be granted in case the court pronouncing the judgment acted in a case where it had no jurisdiction to act, or, having jurisdiction, entered a judgment in excess of its jurisdiction. (Civ. Prac. Act, secs. 436, 442; *Maynard v. Riley*, 2 Nev. 313; *State v. Board of*

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Com. W. Co., 5 Id. 317; *Fall v. Humboldt Co.*, 6 Id. 100; *Mason v. Commissioners Ormsby Co.*, 7 Id. 398; *Helzel v. Commissioners Eureka Co.*, 8 Id. 359; *C. P. R. R. Co. v. Placer Co.*, 43 Cal. 365; *People v. Elkins*, 40 Cal. 642; *Monreal v. Bush*, 46 Id. 79; *Barber v. San Francisco*, 42 Id. 631; *C. P. R. R. Co. v. Placer Co.*, 46 Id. 667.)

II. Sweeney had no right to use any water for any purpose as against Phillip, because the water was decreed to the land, and because he had granted the land by lease without reservation of water to others for five years. (Angell on Water Courses, secs. 6, 8, 9-92; *Vansickle v. Haines*, 7 Nev. 249.)

III. This particular use now claimed was arrested in the pleadings and denied by the decree, and this is conclusive of the right. (Freeman on Judgments, sec. 249; 36 Barb. 88; 37 N. Y. 59; 7 Wall. 102.)

IV. Granting the right in Sweeney which was decreed to him, that is, the use of sixteen one-hundredths parts of the water to irrigate the land; that right does not include the use made of the water, to wit: the right to divert it to Carson in pipes. (Angell, 227-28.)

Lewis & Deal, also for Respondent:

I. The findings and decree, in *Phillips v. Welch*, clearly give to Sweeney the water awarded to him only for certain purposes and uses; that is, for irrigating his land and for domestic purposes. The court finds that he is entitled to the water in connection with his land, and for certain uses mentioned. The denial of the court to allow Sweeney to divert it to be used in Carson, shows that the only use intended was on the land. If the decree only allows Sweeney to use it in a given way, or for certain purposes, he has no right to use it in any other way or for any other purpose. It would be a manifest violation of the decree to depart from its letter or its purpose.

II. The affidavit presented by Phillips is sufficient. A distinction must be made between the total absence of an averment and a defective statement. (*Treadway v. Wilder*, 8 Nev. 97.)

Argument for Petitioner, in Reply.

The affidavit states that said defendant Sweeney did unlawfully and intentionally divert the waters * * * in quantities largely in excess of the quantities authorized or permitted by the decree. This of itself was sufficient to give the court jurisdiction.

III. If the court had jurisdiction to punish Sweeney for contempt, that is the end of this proceeding. Nothing but jurisdiction can be inquired into. We contend that if in this case the district court had power to punish for the contempt alleged, then this court will not review the proceedings. (*Ex parte Kearney*, 7 Wheat. 38; *Lord Mayor of London*, 3 Wils. 188; *Yates' Case*, 4 John. 318; 2 Iowa, 69.)

C. H. Bellnap, in reply:

The affidavit does not state a single fact. Whether the amount of water diverted was excessive would depend upon the amount taken out. Hence, the amount taken out, as well as the amount which Sweeney was entitled to, should be stated.

II. The fact that Sweeney in his answer upon the trial of the suit to determine the rights of the occupants of land adjoining Kings Cañon creek, set up a right to carry a portion of the stream to Carson city, which right is not affirmatively acknowledged in the judgment in that case, cannot be used as an argument in support of the theory that Sweeney has no right to divert the water to Carson city for purposes of sale.

III. The earlier cases in England and in this country, always held that upon certiorari in cases where the party has no other remedy, and where, unless the court exercised its authority there would be a failure of justice, the review under the writ would be extended to the questions of law determined by the lower court, and erroneous decisions would be corrected. These views do not conflict with the decisions heretofore made by this court. This court can, with perfect consistency, make the distinction, which the justice of the case requires.

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By the Court, HAWLEY, C. J.:

E. D. Sweeney, one of the defendants in the above-entitled action, upon the same transcript and evidence that was presented in this case on appeal, (11 Nev. 187,) claims that the district court in adjudging him guilty of contempt “exceeded its jurisdiction, and that the decision of said court in said proceeding was contrary to and against the evidence adduced before said court, and contrary to and against law;” and that, by reason of said court adjudging him guilty of contempt, he has been greatly injured in his property and otherwise, and asks this court, upon a review of the case upon certiorari, to set aside the proceedings and declare the order adjudging him guilty of contempt to be null and void.

It is argued by petitioner’s counsel that the affidavit of the plaintiff Phillips, upon which the contempt proceeding is founded, does not state facts sufficient to give the court jurisdiction of the subject matter; that said affidavit abounds in legal conclusions without the statement of any fact upon which the conclusions are based.

1. Does the affidavit state any substantive fact sufficient to set the power of the court in motion? This is the material question that we are called upon to decide. If it does not, then the proceedings must be annulled. If it does, the judgment must stand.

The statute applicable to this case, provides that: “When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt.” * * * (1 Comp. L. 1522.)

Under a statute identical with these provisions, the supreme court of California, in *Batchelder v. Moore*, say: “The power of a court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which

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such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support. The statute of this state regulating contempts and their punishments provides that when the alleged contempt is not committed in the presence of the court an affidavit of the facts constituting the contempt shall be presented. * * * If there be no affidavit presented there is nothing to set the power of the court in motion; and if the affidavit, as presented, be one which, upon its face, fails to state the substantive facts which in point of law do, or might, constitute a contempt on the part of the accused, the same result must follow, for there is no distinction in such a case between the utter absence of an affidavit and the presentation of one which is defective in substance in stating the facts constituting the alleged contempt." (42 Cal. 414.)

The affidavit in this case charges but one offense. It sets out in detail the fact of the commencement of the suit of *Phillips v. Welch et al.*, and the proceedings had therein. The complaint and answer in said suit are referred to and made a part of the affidavit. The decree rendered in said suit is copied into the affidavit. Affiant then, among other things, states: "That said decision and decree was rendered in open court, and the several parties and their attorneys had actual knowledge thereof, and the same was served in due form on the several parties defendant on the — day of November, 1872, and the third day of December, A. D. 1872; that said decision and decree has never been appealed from, stayed, modified or reversed, but ever since the rendition thereof has been and now is in full force, virtue and effect;" that ever since said decision was rendered, affiant has been, and now is, the owner of the land described in the complaint and mentioned in the decree, and of the water, water-right, usufruct and privilege specified therein; that during the present season affiant has been engaged in the cultivation of his said land, and in growing crops of grain, vegetables and grass, and raising stock thereon, and needs and requires the use of the water awarded to him in said decree, and the whole thereof, to irrigate said land and the crops growing thereon, and for

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watering his stock and for domestic purposes; “that the said defendant, E. D. Sweeney, on the first day of July, A. D. 1875, * * * and on divers and sundry other days between the first and the twenty-eighth days of July, A. D. 1875, did, in disobedience and resistance of a lawful writ and order of said district court, to-wit: the decree and injunction aforesaid made and entered in said cause, and in willful violation and disregard of said writ, order and decree, and in willful contempt of the said court and its said lawful writ, order and decree, unlawfully and intentionally violate and disobey said writ, order and decree, and unlawfully and intentionally diverted the waters of said stream in violation of said decree, and contrary to the terms and provisions thereof, and in violation of and contrary to the injunction therein contained ;” “that at the several dates aforesaid, said defendant, E. D. Sweeney, did unlawfully and intentionally divert the waters of said stream in quantities largely in excess of the quantities authorized or permitted by the decree, and for uses and purposes not authorized but forbidden by the decree;” that at the several dates aforesaid affiant needed and required all the water awarded to him by said decree in connection with his said land, to wit, thirty-one one-hundredth parts thereof, to irrigate said land and the crops growing thereon, and that he was deprived thereof by said excessive and unlawful diversion and use by said defendant, E. D. Sweeney, and that by such deprivation affiant was injured in his right and land, and that his crops greatly suffered and were actually damaged.

It is claimed by counsel for petitioner that the quantity of water to which he was entitled is clearly a question of law, and that the affidavit should contain a statement of the exact quantity of water that he was actually diverting, so that the court, from such statement, could have determined whether he was violating the decree or order, and especially is it contended that this fact should have been stated in the affidavit, because it appears from other averments therein that Sweeney has acquired the title of defendant Quill to the lands mentioned in the decree since the rendition thereof. Ordinarily, this would be the best mode of stating the facts.

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But the decree rendered in the suit of *Phillips v. Welch et al.* is in many respects a peculiar one. It states the exact fractional part of the water in King's cañon to which each of the parties to the suit is entitled. The court found, among other facts, that plaintiff Phillips was the owner in fee of certain lands described in his complaint; that said land is agricultural and farming land; that the stream known as Kings Cañon creek flows through and over said land in the natural channel of said stream; that thirty-one one-hundredth parts of the water customarily flowing in said stream are necessary to be used in irrigating said land and the crops of grass, grain, and vegetables grown thereon, and for watering the stock, and for household and domestic uses of the plaintiff; "that the plaintiff as against the defendants, and each of them, is the owner of and entitled to use, for the purpose of irrigating said land and the crops grown thereon, * * * thirty-one one-hundredth parts of all the water customarily flowing in said stream;" "that the defendant, E. D. Sweeney, is the owner in fee of the land described in his answer, part of which is agricultural and farming land; that the waters of said creek flow in the natural channel through said land; that a portion thereof, to wit: sixteen one-hundredth parts of all the water customarily flowing in said stream is necessary for the irrigation of said land and the crops grown thereon, and for watering the stock and for the domestic purposes of the defendant; and that the defendant, E. D. Sweeney, in connection with said land, is the owner of an usufruct in, and is entitled to use sixteen one-hundredth parts of all the water customarily flowing in said stream for said purposes." Defendant Quill is entitled to use six one-hundredth parts in the same manner. The balance is portioned out respectively, in like manner, to the other parties defendants in said action. The decree follows the findings. It enjoins the plaintiff from diverting or otherwise depriving defendants, or either of them, of the water decreed to them. It perpetually enjoins the defendants, and each of them, "from diverting * * * any part of said Phillips' portion of said water, or otherwise depriving him of the use of the same for irrigation and for stock and domestic purposes."

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Taking the facts in the decree with the sworn statements of Phillips, it seems to us that the affidavit was sufficient to give the court jurisdiction of the subject-matter of the contempt, and of the person of the petitioner. Conceding that the legal principles already quoted from the case of *Batchelder v. Moore* are applicable to this case, yet upon an examination of that case it must be admitted that the facts in relation to the affidavits are entirely dissimilar. In *Batchelder v. Moore*, the proceedings were based wholly upon the statute of that state, which provided "that every person who shall have been or shall be hereafter dispossessed or ejected from" premises under the judgment of a court, and who shall himself re-enter, or procure some one else to re-enter, shall be deemed guilty of a contempt. The court, after alluding to this statute, say: "It is essential that the person accused should be one who has been ejected or dispossessed, as provided by the act; and unless he be such person the act has no application whatever, and he cannot be guilty of the contempt therein denounced. In the affidavit of Batchelder, there is a total omission to allege that Calderwood was such a person, and the omission is obviously jurisdictional in its consequences." From the facts stated by the court, it will readily be seen that in that case there was an entire omission to make any statement whatever, defective or otherwise, of the essential fact that the statute positively required. The omission reached the very substance that was, by the provisions of the statute, necessary to be included in order to give the court jurisdiction. It was, as the court very properly said, the same as if no affidavit at all had been presented. Here, the objections are to the form, not the substance of the affidavit.

The essential fact to be determined by the court was whether or not the defendant Sweeney had, in disobedience of the decree and of the lawful process issued thereunder in the suit of *Phillips v. Welch*, deprived the plaintiff Phillips of the quantity of water decreed to him in that case. There is an averment in the affidavit that Phillips was deprived of the water, to which he was entitled, by the excessive and unlawful diversion and use of the water by Sweeney. It is

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also stated that Sweeney, in direct violation of said decree unlawfully and intentionally diverted the waters¹ of King's Cañon creek in quantities largely in excess of the quantities authorized or permitted by the decree, to plaintiff's damage, etc. The affidavit shows the exact quantity to which Sweeney is entitled, and when it states that he used a greater quantity it is as positive in its terms, in so far as the question of violating the decree and order is concerned, as if it stated the exact fractional part of the water of the stream which he had unlawfully diverted. But, admitting that there is a defect in the manner of stating these facts, it does not, as did the omission in *Batchelder v. Moore*, reach the substance, so as to be "obviously jurisdictional in its consequences."

Respondent's counsel contend that if we find the affidavit to be sufficient to give the court jurisdiction, we cannot examine the question whether or not the order adjudging Sweeney guilty of contempt is sustained by the evidence. This position is abundantly sustained by the authorities. This court, in all the numerous cases brought before it by the writ of *certiorari*, has uniformly held that the inquiry upon the writ could not be extended any further than is necessary to determine whether the inferior tribunal has exceeded its jurisdiction or has regularly pursued its authority. (*Maynard v. Railey*, 2 Nev. 313; *State v. County Commissioners of Washoe County*, 5 Nev. 317; *State ex rel. Fall v. County Commissioners of Humboldt County*, 6 Nev. 100; *State ex rel. Mason v. County Commissioners of Ormsby County*, 7 Nev. 393; *Hetzel v County Commissioners of Eureka County*, 8 Nev. 359.)

The decisions in California, including *Batchelder v. Moore*, are to the same effect. (*People ex rel. Lamby v. Dwinelle*, 29 Cal. 632; *People v. Johnson*, 30 Cal. 98; *Winter v. Fitzpatrick*, 35 Cal. 269; *People ex rel. Waldon v. Elkins*, 40 Cal. 642; *Barber v. Board of Supervisors of the City and County of San Francisco*, 42 Cal. 630; *Yenawine v. Richter*, 43 Cal. 312; *Central Pacific Railroad Company v. The Board of Equalization of Placer County*, 43 Cal. 365; *Petty v. County Court of San Joaquin County*, 45 Cal. 245; *Monreal v. Bush*,

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46 Cal. 79; *Central Pacific Railroad Company v. Placer County*, 46 Cal. 670; *Reynolds v. County Court of San Joaquin County*, 47 Cal. 604.)

The affidavit of Phillips, in our judgment, presented a case for the legitimate action of the court. The district court had the authority to hear and determine the question whether or not Sweeney had been guilty of disobeying the decree, or any order or writ of injunction issued and served pursuant to its provisions. The court, after acquiring jurisdiction for that purpose, had the undoubted right to decide the question upon the law and the evidence. It may have erred. Whether it did or did not, it is not our province, in this proceeding, to inquire. We are prohibited by the statute from investigating this question. Even admitting that the court erred in the conclusions it reached, yet all the authorities above cited hold that error in judgment, in respect to a question which the court is authorized to investigate and determine, does not, by any means, constitute an excess of jurisdiction. If it did, then every error committed by any inferior tribunal, in the course of judicial investigations, would be an excess of jurisdiction, and the writ of certiorari would be converted into a writ of error instead of remaining, where the statute has placed it, a writ of review; and every case brought before us under this writ would have to be heard and determined in the same manner as if the right of appeal existed.

If appellate courts were compelled to examine the evidence in proceedings of this character, the result would have a tendency to destroy the binding force and effect of all judgments of justices of the peace and other inferior tribunals.

By adopting the rule contended for by petitioner, every criminal action for an alleged misdemeanor prosecuted and tried before a justice of the peace could, after the conviction of the defendant, on appeal to the district court, be brought before this court by the writ of certiorari, and it would be the duty of this court to examine into the evidence and see if justice had been done, and to determine whether the right of the defendant, in his person or prop-

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erty, has been in any manner injuriously affected by any error that the inferior court may have committed during the progress of the trial, and if error appears, the judgment would have to be set aside; thus, as before stated, virtually giving the right of appeal in cases where no right of appeal exists. Nevertheless, if such a course is authorized by the statute, it would be our duty to follow it without regard to the consequences. But it is manifest that such is not the language, meaning or intention of the law. Whenever the inferior tribunal has regularly pursued its authority, and has not in any respect exceeded its jurisdiction, our authority ceases. We cannot in this proceeding furnish a panacea for all the "ills that flesh is heir to," nor can we correct any errors of law or fact, not jurisdictional in their character, that may be committed by any inferior tribunal acting within the scope of its authority.

2. In pursuance of the warrant of attachment issued upon the affidavit of Phillips, the petitioner appeared before the court in person and by counsel, and made answer, specifically denying all the averments in said affidavit charging him with a disobedience of the process issued in the suit of *Phillips v. Welch*. The court investigated the charge, heard and considered the evidence for and against the petitioner, and found the following facts:

"First. At the several dates mentioned in the proceedings, to wit: July 1, * * * 1875, the defendant, E. D. Sweeney, was diverting from the natural channel of said Kings Cañon creek, above the lands of H. P. Phillips, by means of pipes and flumes, and conducting the same permanently away from the stream and from the land of plaintiff to the town of Carson, to supply the people of Carson city with water, a large portion, to wit: about forty inches of the water of said stream;

"Second. In the said cause of *Phillips v. Welch et al.*, said Sweeney answered and defended, asserting and claiming a right to divert from said stream, by means of his pipes and flumes, a portion, to wit: eight inches of the waters of said stream, and conduct the same, by means of his pipes and flumes away from said stream to the town of

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Carson, which claim of right was litigated in said cause, and was not allowed by the court;

“Third. At the several dates aforesaid, * * * the plaintiff (Phillips) was seized of the land and water privilege described in the proceedings herein, and required and needed, and was entitled to have flow to and upon his land, and to use the same in the manner and for the purposes specified in the decree, thirty-one one hundredth parts of the water flowing in said stream, and at the several dates aforesaid * * * said Phillips and his land were deprived of the water which was awarded to said land by said decree, and no water, except a small quantity of seepage water was flowing to the land of said Phillips, and said lands and the crops growing thereon were thereby injured, and the right of said Phillips was thereby violated;

“Fourth. At the several dates aforesaid, * * * while said Sweeney was delivering said quantity of water away from the stream, and away from the land of said Phillips to Carson for sale to customers, the said land described in the answer of Sweeney and in the decree as belonging to defendant E. D. Sweeney, and which land was decreed sixteen one-hundredth parts of the water of said stream for irrigation, and for stock and domestic purposes, was occupied and cultivated by one James Authers as the tenant of said Sweeney under a written lease, which lease granted the land to said Authers without reservation of the water for five years, * * * and said Authers was at said several dates using the waters of said stream to irrigate said land, and the crops thereon;

“Fifth. At the several dates aforesaid * * * the said land known as the Quill land * * * was being occupied and cultivated, and all the water awarded to said Quill in connection with said land to irrigate the same was being diverted upon and used in irrigating the same.

“Wherefore, it is now and here considered and adjudged by the court that the defendant, E. D. Sweeney, has been guilty of the misconduct alleged against him in the proceedings herein, to wit, the willful violation of the order, decree and injunction made and entered in said cause, and that

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such misconduct was calculated to and did defeat, impair and prejudice the rights of said Phillips in said action * * * awarded to him by the decree, and was calculated to and did injure the said land of the said Phillips, and the crops of the said Phillips growing thereon, and was calculated to and did damage the said Phillips. And it is now and here considered, ordered and adjudged that the said E. D. Sweeney has been guilty of contempt of court, and that he be fined," etc.

It is claimed by petitioner's counsel that an examination of the evidence will show that he was acquitted of any violation of the injunction order by using any water in excess of the amount allowed him by the decree; but was found guilty of a contempt of the district court in diverting the waters of said stream, and conveying the same to Carson city for sale; the court holding that the decree prohibited such use, and only allowed the respective parties to use the water for irrigation in connection with their land, and for stock and domestic purposes. It is argued that this is an erroneous construction of the decree, and hence the order should be set aside, as petitioner has really been found guilty of contempt for doing an act which he is not directly forbidden to do by the decree.

It is admitted that the previous decisions of this court upon the question of jurisdiction are stereotyped, and all adverse to an examination of the evidence in cases where it appears that the inferior tribunal acted within its jurisdiction, and that the general rule, as to the province of the writ, is such as we have stated; but it is contended that this court has hitherto acted without mature consideration, and superficially followed the general rule, without noticing the fact that in the earlier cases in England and in the United States a distinction was made that ought to be observed in this case, viz.: that where it affirmatively appears that the petitioner has no other remedy, and where, unless the appellate court exercised its authority, there would be a failure of justice, the review was extended to an examination of the evidence and all questions of law determined in the lower court, and if any error was found the proceedings

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were annulled. In this connection it was argued that the present case differs from all previous decided cases in this state wherein (with but one exception) the petitioners had some other remedy and the decision was not final.

The argument that petitioner had no other remedy was advanced when this case was argued on the appeal, and this court was then asked by both parties to examine the evidence and decide the case upon its merits, without reference to jurisdictional questions. After mature consideration, we then held that it was the duty of the court to decide, "*in limine*, whether in a case like this, where the parties before the court are willing to concede jurisdiction for the purpose of obtaining our opinion upon the matters in controversy, we ought to raise the question ourselves." We decided that it ought to be done, and disposed of the case purely upon jurisdictional grounds. (11 Nev. 188.)

Petitioner was next brought before the chief justice upon a writ of habeas corpus, where a similar argument was again advanced, and the petitioner was remanded into custody upon the familiar principle, almost universally recognized, that when a court commits a party for a contempt its adjudication is a conviction, and its commitment, in consequence, is execution; and no court can discharge on habeas corpus a person that is in execution by the judgment of any other court having jurisdiction of the subject matter of the contempt.

This principle is acknowledged by counsel for petitioner to be correct, and is certainly too well settled to require a citation of the authorities. Some of the cases are referred to in *Ex parte Winston*, 9 Nev. 71.

Without attempting to follow the learned counsel in his review and criticisms of former cases on certiorari, decided by this court, it seems to us that it is only necessary, in addition to what we have already said, to state that we are not acting upon the common law rule relating to the writ of certiorari, under which courts in earlier times, and in New York and some of the other states at the present time, often exercised their discretion in granting or refusing the writ, according to the justice of the case. The truth is, that

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there is no uniformity upon this point, and we are of opinion that even under the writ as known at common law a majority of the decisions in the United States hold that the writ must be confined to the question of jurisdiction; but, however that may be, it is here unnecessary to decide, as the question is to some extent foreign to the decision in this case.

This court must follow the provisions of the statute of this state, the language of which is clear, plain and, in our judgment, decisive. It has been often quoted, and invariably construed one way: "The writ shall be granted in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." (1 Comp. L., 1497.)

Under this provision the court is not authorized to issue the writ, because there is no other remedy, unless it also appears that the inferior tribunal has exceeded its jurisdiction.

The statute in another section provides as follows: "The review upon this writ shall not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer." (1 Comp. L., 1503.)

In *Maynard v. Railey*, *supra*, this court in construing this section held that the expression "has regularly pursued its authority," did not authorize an inquiry into any irregularity or question beyond that of jurisdiction.

In the *C. P. R. R. Co. v. The Board of Equalization of Placer Co.*, *supra*, it was there, as here, argued by able counsel that the review of the proceedings of the inferior tribunal was not to be confined to the bare question whether the subject matter or the parties were within the jurisdiction of the court, but must be extended to all questions affecting the mode in which the jurisdiction or the power of the inferior tribunal has been exercised, and that the statute must be so construed as to authorize the court, upon a review of the case, to determine not only whether

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the inferior tribunal had authority to deal with the parties and subject matter; but whether it dealt with them in the manner authorized by law. The court, after citing the provisions of the statute of that state, identical with the provisions quoted from our statute, held that the words "has exceeded the jurisdiction of such tribunal, board," etc., and "has regularly pursued the authority of such tribunal, board," etc., as expressed in these two respective sections of the practice act, present substantially the same idea, and refused to inquire into or decide any question except that of jurisdiction. This court has always followed this construction, and we are satisfied that no other conclusion can be arrived at without doing violence to the language of the statute.

Under this construction can it seriously be contended that it is our duty to decide this case upon its merits without reference to the question of jurisdiction?

The fourth subdivision of the act relating to contempts and their punishments provides that "disobedience or resistance to any lawful writ, order, rule or process issued by the court or judge at chambers," shall be deemed a contempt. The affidavit sets forth the fact that petitioner has disobeyed a lawful writ and order that was issued by the district court of Ormsby county under a final judgment obtained in said court in the case of *Phillips v. Welch*. Upon this affidavit a warrant was issued and petitioner was brought before the court, and a hearing was had, which resulted in his conviction, and he was fined in the sum of five hundred dollars.

It is, of course, admitted that the district court has the power to punish for contempts in cases like the one under consideration. It must also be admitted, if the affidavit is sufficient, that the court had jurisdiction of this case. As was said in the case last referred to from California, "jurisdiction, as applied to a particular claim or controversy, is the power to hear and determine that controversy;" and as jurisdiction is the power to hear and determine a disputed controversy, it is beyond all question that the district court of Ormsby county had jurisdiction of this case. In fact no

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other court could hear or determine the disputed controversy or punish petitioner if he was found guilty of the contempt. (*Ex parte Cohen and Jones*, 5 Cal. 494; *People ex rel. Wright v. The County Judge of Placer County*, 27 Cal. 151; *Lessee of John Penn, Jr., v. Messenger*, 1 Yeates, 2; *Passmore Williamson's Case*, 27 Penn. St. 18; *Gates v. McDaniel*, 4 Stew. and Port. 69; *Ex parte Stickney*, 40 Ala. 167; *Yates v. Lansing*, 9 Johns. 423; *State v. Toule*, 42 N. H. 544; *Vilas v. Burton*, 27 Vt. 61; *Crosby v. Lord Mayor of London*, 3 Wilson, 198.)

The truth is, that in a case like the present, where the court acquired jurisdiction of the subject-matter and of the person of the petitioner, this court has no jurisdiction either on appeal, writ of error, habeas corpus or certiorari.

The decisions are clear, positive, and, in our judgment, conclusive upon this point.

In *The People v. Johnson, supra*, defendant was arrested, tried and convicted before a justice of the peace, fined one hundred dollars, and upon appeal to the county court the judgment was affirmed. An appeal was then taken to the supreme court, and there dismissed for want of jurisdiction. Sanderson, J., in delivering the opinion of the court, said: "This is a criminal action for an alleged misdemeanor, in which no question as to the jurisdiction of the court below is made. In such a case this court has no jurisdiction, either on appeal or writ of error or certiorari.

* * * Our jurisdiction * * * to review the proceedings of inferior courts, boards and officers upon certiorari is limited, by the very nature of the writ, to cases where the jurisdiction of the inferior courts, board or officer is impeached. Hence, in no respect have we jurisdiction in the present case. In all cases of misdemeanor, the constitution has prescribed that the judgment of the county court, whether erroneous or not, shall be final except where there has been an excess of jurisdiction, in which case only it can be reviewed. With the wisdom of this provision we have nothing to do." It will be observed from reading the entire opinion in that case that it involved questions of great importance. A certain road for the general use of

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the public was claimed by private parties, for whom the defendant was acting as gate-tender and collector of tolls. The legality of the toll was there involved in the action just as the legal right of the petitioner here as to diverting the waters from King's Cañon creek to Carson city is involved. The appeal in that case, just as the proceedings in this case, was avowedly taken for the purpose of determining the right of defendant to do a certain thing, and the court was there, as here, urged to pass upon the legal questions, notwithstanding it might be of opinion that it had no jurisdiction. The court, in refusing to consider the case on its merits, among other things, said, that to examine such a case upon its merits, in order to gratify the wishes of counsel, "would be to set a most pernicious example, and establish a dangerous precedent."

It is true, that in that particular case, there was another remedy whereby a decision upon the merits could be obtained, but the reasoning of the decision, nevertheless, applies to this case.

A contempt of the character alleged in this proceeding is a specific, substantive and distinct criminal offense, and under the constitution and laws of this State the judgment of conviction in such a case, if within the jurisdiction of the inferior court, is as final and conclusive as in any other criminal case for a misdemeanor. (*Phillips v. Welch, supra.*)

In *The People ex rel. Lamby v. Dwinelle, supra*, the case was brought before the supreme court of California by certiorari for the purpose of reviewing the proceedings had in the district court, where the court had rendered a judgment of conviction against the relator Lamby for contempt. The proceedings in the district court were instituted under the provisions of the statute referred to in *Batchelder v. Moore*. The defense that Lamby made did not satisfy the district court that his re-entry after he had been dispossessed under the action of ejectment was by legal right, and the supreme court, in discussing the questions involved, say: "Whether the court was right or wrong upon the merits of the issue joined upon these proceedings is not the question before us, but whether the court exceeded its jurisdiction is the sub-

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ject of inquiry." The court then say that the proceedings which resulted in the judgment of conviction was authorized by the statute; that "the court had jurisdiction of the subject-matter and of the person of the relator, and even if it were admitted that the court erred upon the merits, it cannot be said the judgment for that reason was *coram non judice*."

So in this case the statute of this state authorized the proceedings in the district court. That court had jurisdiction of the subject-matter and of the person of petitioner. The petitioner upon a hearing failed to satisfy the court that his diversion of the water from King's Cañon creek was not in disobedience of the decree and injunction order in the suit of *Phillips v. Welch*, or that he did not by such diversion deprive the plaintiff Phillips of the quantity of water decreed to him in said action, and we cannot upon the writ of certiorari review the case upon its merits.

The argument as to the hardships of this case so earnestly advanced by petitioner's counsel, even if conceded to exist, cannot be considered.

As was said by the supreme court of the United States in *Ex parte Kearney* (7 Wheat. 45): "Where the law is clear this argument can be of no avail. * * * Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice"

The writ must be dismissed. It is so ordered.

BEATTY, J., dissenting:

I dissent from the judgment and opinion of the court upon several points, which, in my opinion, are of sufficient importance to demand a full statement.

As to the proposition that this court has no power upon certiorari to inquire into or to correct any error of an inferior tribunal, unless it involves an excess of jurisdiction, I fully agree with my associates, but as to what constitutes an excess of jurisdiction, and as to how such excess of juris-

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diction may be shown in this proceeding, there is a wide difference of opinion between us.

If I understand the effect of the opinion of the court, interpreted as it must be, in the light of the facts of this case, it is henceforth the law of Nevada that any inferior judicial tribunal may exceed its jurisdiction with impunity, if it takes care to keep out of the record of its proceedings those matters which will show the excess of jurisdiction. And it is held, in effect, if not in express terms, that when the powers of such inferior tribunal have been "regularly set in motion" by the presentation of a charge of which it has jurisdiction, it may thereafter proceed to try, convict and punish the person accused for an offense of which it has no jurisdiction. And no matter how clearly the subsequent proceedings may show that the charge by which the powers of the court were "set in motion" was completely ignored in the judgment finally rendered, and the accused convicted of another offense entirely beyond the jurisdiction of the court, we can never know that there has been any excess of jurisdiction. If we can see that there was a good charge made of an offense within the jurisdiction of the court, and if the sentence of the court is such as might have been imposed upon a conviction of that offense, we must close our eyes to everything beyond, even to the plain construction of the written findings of the court, showing that the accused was not convicted of the offense charged, but was convicted of something else; convicted, in fact, as in this case, of something which is no offense at all. I shall endeavor to show that upon such theories alone can the conclusions of the court be upheld.

The petitioner Sweeney was charged with a contempt of court in violating the decree and injunction in the case of *Phillips v. Welch*, to which he was a party defendant. He was charged with doing two things which were supposed to be forbidden by the decree and injunction: First. With diverting more water than he was entitled to divert; Second. With using that water in a mode forbidden by the decree; that is to say, he was accused of conveying the water permanently away from the stream, in pipes, and selling it to

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customers in Carson city instead of using it to irrigate his land, through which the stream flows.

The first of these charges is the one dealt with exclusively in the opinion of the court, and it is there held that it was a sufficient charge to give the court jurisdiction to proceed with the trial of the petitioner. Here, again, I am in thorough accord with the majority opinion. I fully agree that the court had jurisdiction to try Sweeney on that charge, and if he had been convicted and fined for an excessive diversion of water, I should have joined with the court in saying that the writ of certiorari afforded him no remedy, no matter how erroneous his conviction might have been. But the fact happens to be, and it is shown by the record in the case, that Sweeney was acquitted of any excessive diversion of water, and was convicted only on the other charge of diverting water to Carson.

At the close of the testimony for the prosecution the district judge decided and announced his opinion in open court that Sweeney had not diverted more water than was awarded to him by the decree, and that the only question was as to whether his diversion of water to Carson city for sale was a violation of the decree. Having held this question under advisement for some days, he filed his written findings and judgment convicting Sweeney of contempt and fining him therefor. The respondent contends that those findings show that Sweeney was convicted on both charges, and that we cannot consider the oral decision of the court that Sweeney was not guilty of the first.

As to the proper construction of the written findings of the court—the material portions of which are quoted in the opinion of the chief justice—all that is there said is: “From this order we are left to infer that the defendant, Sweeney, did use the waters of said stream in excess of the quantity allowed him by the decree.” We are, indeed, “left to infer” that Sweeney was found guilty of excessive diversion of the waters of the stream, and we are left to infer it without any valid grounds for such an inference. But it is upon this inference, and the assumption that we must utterly ignore the oral decision of the district judge

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expressly acquitting Sweeney of any excessive diversion of water, that the judgment of the court is made to stand. It will be my endeavor to show that neither the inference nor the assumption is sustainable. And if I shall fail to show that the written decision of the court, standing by itself, acquits Sweeney of excessive diversion of water, and if I also fail to show that his oral decision may be considered in this proceeding, I shall still insist that, although the written decision of the court may not be an acquittal on the charge of excessive diversion, it clearly is a conviction on the charge of forbidden use, and, consequently, that it shows that Sweeney was tried, convicted and fined—in part, at least—for an act which was not in violation of any lawful order of the court, and which, therefore, constituted no offense which the court had jurisdiction to try by the summary and arbitrary process of attachment for contempt.

Before entering upon a discussion of these points, however, it will be well to mention the manner in which the record of this case, whatever is the record, has been brought before us.

The petitioner, shortly after his conviction in the district court, appealed from the judgment, and in support of his appeal prepared a statement of the case, which was filed in this court in connection with the record of the affidavit, attachment, answer of the defendant, findings of the court, etc. The statement was not settled by the court in the form of a bill of exceptions, but was agreed to by the counsel for the prosecution and defense. It is in that statement so settled that the fact is made to appear that the district judge at the close of the testimony for the prosecution declared Sweeney not guilty on the charge of excessive diversion of water. The appeal in which that statement was brought up having been dismissed for want of jurisdiction in this court to entertain it (11 Nev. 187), this proceeding was commenced, and, by stipulation between the respondent and petitioner, it was agreed that, instead of a regular return to the writ of certiorari, the transcript prepared for the purposes of the appeal should be deemed and treated as a return to the writ, so far as its contents might be proper

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to be considered if regularly returned. According to my construction of this stipulation we are entitled to look at everything in the transcript before us which we might have ordered to be returned to the writ, and which will enable us to decide whether the district court has exceeded its jurisdiction.

In the case of *Whitney v. Board of Delegates* (14 Cal. 500), which was approved by this court in the *State v. Commissioners of Washoe* (5 Nev. 318), it was decided that the writ of certiorari brings up everything necessary to determine the question of jurisdiction, not only that which is technically record, but everything in the nature of record, including the evidence in regard to jurisdictional facts where their existence is in question. (See *People v. Goodwin*, 1 Selden, 572.) These cases establish the general principle, but the decision in *Blair v. Hamilton* (32 Cal. 52) is so aptly in point that I quote: "It is first insisted, on the part of the defendant, that in passing upon the question before us no resort can be had to the finding of facts, upon the ground that the same constitutes no part of the record, for the reason that it was not prepared and filed until the next term of the court, at which time, as is claimed, the court had lost all jurisdiction of the case. If the finding be disregarded the result would be the same, as will presently appear; but were it at all necessary that we should be put in possession of the facts in view of which the court below acted, and which are not technically of record, it would be competent for this court to require the court below to certify such facts in its return to the writ. In many cases jurisdictional facts may not appear of record, either by failure of the inferior court or officer to follow the requirements of the law and make them of record, or because the law itself does not require it to be done. In such cases this court, and all other courts having jurisdiction to review and correct the proceedings of inferior courts, would be powerless unless it can compel the inferior tribunal to certify to this court not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever questions

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as to the jurisdiction of the inferior tribunal may be involved, *and the grossest abuses of power, to the great reproach of the law, might be perpetrated with impunity and without the possibility of a remedy.*"

The language which I have italicized points out the absurdity of the position that a court which has power to correct excesses of jurisdiction of inferior tribunals may be utterly deprived of the means of affording any redress by the neglect or willful misconduct of the inferior court in failing, or purposely omitting, to put upon record the matters by which its excess of jurisdiction may be shown. Section 443 of our practice act is identical with section 453 of the California practice act, by virtue of which it was held, in the case just referred to, that the supreme court could compel a full return of everything necessary to determine the question of jurisdiction. I say, therefore, assuming the correctness of that decision, that in this case, if the decision of Judge Wright, orally announced at the close of the testimony for the prosecution, that Sweeney was not guilty of any excessive diversion of water, will enable us to say that the district court exceeded its jurisdiction in the proceeding under review, then we could have compelled a return of that decision to our writ of certiorari; and if we could have compelled a return of it, then I say that under the stipulation of these parties it may be considered in this case. I hope to be able to make it clear that the acquittal of Sweeney on the first charge necessarily convicts the district court of an excess of jurisdiction, because it will follow that he can only have been found guilty on the second charge, unless we are to adopt the respondent's construction of the written findings afterward filed, and hold, with him, that the district judge, after having induced Sweeney to believe that he would find in his favor on the only issue of fact in the case, and to abstain from introducing rebutting testimony, was guilty of the gross outrage of afterward changing his decision without giving the petitioner any opportunity of introducing his evidence. I should be very unwilling to conclude that the district judge had been guilty of such conduct, and I fail to see that the

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written findings put him in the position to which the argument of respondent would consign him. But if I were forced to conclude that he had done what respondent says he has done, I should still say that he had exceeded his jurisdiction in another particular.

The district court was bound to hear the witnesses for the defense. (Comp. Laws, 1528.) To have refused to do so would not only have been a gross outrage upon propriety and decency, but would have been a departure from the forms prescribed by law, and therefore an excess of jurisdiction; for a court which is limited to one mode of procedure has no authority to proceed by a different mode. This explains the meaning of the language of the statute: "has regularly pursued the authority," etc. (Comp. Laws, 1503.) (*People ex rel. Seward v. The Judges of the County of Dutchess*, 23 Wend. 362.) Then, if the district court would have exceeded its jurisdiction by arbitrarily refusing to hear Sweeney's witnesses, how much better would the case stand if, after deluding him into sending away his witnesses unsworn, by pretending to acquit him on the first charge, the court had afterward found him guilty on that charge? The distinction between the two cases would scarcely have amounted to a difference. But, in truth, the district judge never did convict Sweeney of diverting more water than he was entitled to divert, and an inspection of his written findings will show the truth of this statement. Before entering upon that inquiry, however, it will be convenient to ascertain the proper construction of the decree and injunction in the case of *Phillips v. Welch*, and to determine what acts would be violative thereof.

The affidavit upon which Sweeney was attached sets out the findings of fact, conclusions of law and decree and injunction in that case, from which it appears that the suit was brought to enjoin the defendant and others, (including Sweeney) from diverting the water of King's Cañon creek above the land of plaintiff, through which it flows in its natural channel. The nature of the litigation and the issues determined will sufficiently appear from those portions of the findings and decree which relate to the rights of Phillips

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and Sweeney. It was found that the stream flows in its natural channel through the lands of the several parties to the suit, and that certain proportions of the water are necessary to them for irrigating their land, watering their stock, and for household and domestic purposes. To Phillips, it was found that thirty-one one-hundredths of the stream are necessary, and to Sweeney sixteen one-hundredths. It was found that the grantors of Phillips had appropriated thirty-one one-hundredths of the stream for the purposes specified. As to whether Sweeney or his grantors had made any appropriation, the findings are silent; but the conclusion of the court as to his rights, respecting the use of the water allotted to him, is expressed in the same language as that with respect to the rights of Phillips. The finding as to Sweeney is as follows: "That the defendant, E. D. Sweeney, is the owner in fee of the land described in his answer, part of which is agricultural and farming land; that the waters of said creek flow in the natural channel through said land; that a portion thereof, to wit, sixteen one-hundredth parts of all the water customarily flowing in said stream, is necessary for the irrigation of said land and the crops grown thereon, and for watering the stock, and for the domestic purposes of the defendant; and that the defendant, E. D. Sweeney, in connection with said land, is the owner of an usufruct in and is entitled to use sixteen one-hundredth parts of all the water customarily flowing in said stream for said purposes." By similar findings the whole stream is parceled out in various proportions to the several parties. The conclusion as to the rights of Phillips and Sweeney are as follows: "That the plaintiff, H. P. Phillips, is entitled to have and recover from all of the defendants and each of them, and to have a decree for thirty-one one-hundredth parts of all the water customarily flowing in said stream, and for the use of the same for the irrigation of his said land and crops, and for his stock and domestic purposes.

"That the defendant, E. D. Sweeney, is entitled to recover against the plaintiff and from each of the other defendants judgment and decree for sixteen one-hundredth parts of all the water customarily flowing in said stream,

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and for the use of the same in connection with his said land for irrigation and for stock and domestic purposes."

The decree follows these findings and conclusions. It declares the rights of the respective parties, and merely enjoins each of them from diverting any portion of the water allotted to the others, or otherwise depriving them of the use of the same for irrigation, stock and domestic purposes. In other words, the only thing the petitioner, Sweeney, was forbidden to do by the express terms of the decree and injunction was to divert or consume more than sixteen-hundredths of the stream; and the question which in the opinion of the district court was the only one to be decided, and which I now propose to examine, is, whether it was a contempt of court in the petitioner to bring his share of the water to Carson and sell it, instead of using it on and in connection with his land.

It is *res adjudicata* in this case that Sweeney's offense, if any, is a criminal offense, (11 Nev. 187). In *Maxwell v. Rives*, (11 Nev. 221) we decided that "the statute concerning contempts is a penal statute, and must be strictly construed in favor of those accused of violating its prohibitions."

Upon the same principle it must be held that when a man is criminally prosecuted for violating an order of court, the order must be strictly construed in his favor. It stands in the same relation to the act complained of that the penal statutes bear to ordinary offenses. It is of no greater dignity than the laws of the land and deserves no peculiar favor. The presumptions in favor of innocence and the liberty of the citizen weigh just as strongly against it as they do against an act of the legislature. When a man is criminally charged for doing an act in violation of law, a law must be shown which distinctly forbids the act complained of, and its express terms will not be aided by doubtful implications in order, by construction, to make that a crime which is not plainly declared to be so. Applying this rule to the decree in *Phillips v. Welch*, it seems clear to my mind that the parties to that action were forbidden to do but one thing; they were only forbidden to con-

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sume more than their share of the water, and they could be guilty of contempt in no other way than by violating that injunction.

This certainly is the full extent of the injunction if we look only to its express terms. But counsel for respondent contend that the finding and decree of the court that Sweeney was, "in connection with his land," the owner of and entitled to use for irrigation, etc., so much water, was an implied prohibition of any other use. But surely it will not be contended that any such prohibition is *necessarily* to be implied from the terms of the findings, and if not it certainly cannot be made the ground of a criminal charge. To my mind, however, no such implication is even remotely deducible from the language of the decree. The fact that it parcels out the stream among half a dozen riparian proprietors, giving them the right to consume it entirely for irrigation; the fact that Sweeney is decreed to have exactly the same rights with respect to his sixteen-hundredths that Phillips has to his thirty-one-hundredths, and that it is found that the grantors of Phillips appropriated that amount of water; and the fact that there is no good authority for holding that Sweeney, as a mere riparian proprietor, could have the right to consume nearly a sixth part of the stream for irrigation, is proof conclusive, to my mind, that the decree is, in effect, a finding that Sweeney's right was acquired by appropriation. The absence of a specific finding to that effect counts for nothing, for, as has often been decided in this court, the facts will be presumed, in the absence of any showing to the contrary, to be such as will sustain the conclusions of the court. If, then, it is a fact that Sweeney's right, as established by the decree, is a right founded upon appropriation or *user*, the law is well settled that he may change the use at his pleasure. So long as he consumes no more water than he has been accustomed to consume, those who are below him on the stream have no right to complain of any change in the mode of consumption, for the reason that they are not injured thereby. (Angell on Water Courses, secs. 227, 228, 149, *et seq.*) Besides, that part of the decree here referred to is

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merely an affirmative declaration of Sweeney's rights. In declaring that he has one right it does not deny him all other rights. When it says that Sweeney has a right to irrigate, it does not thereby declare that Phillips has a right that he shall do nothing but irrigate. The rights of Phillips are expressly declared in another portion of the decree, and the truth seems to be that the necessary implication from the finding in favor of Sweeney is that he has the right of all appropriators of water, to change the mode of use as often as he pleases, provided he does not thereby diminish the quantity or deteriorate the quality of the water flowing to those below him. The good sense of this rule seems to be obvious. But counsel argue that the change of use in this case is an injury to Phillips, because if Sweeney used his water on his land he might not consume it all, and then it would flow back into the stream and down to the land of Phillips; and also that if Sweeney kept his land wet Phillips' land would get some advantage from percolation and absorption. It is a sufficient answer to this to say that Phillips has no right independent of the decree to such incidental advantages as depend upon Sweeney's volition. If Sweeney has the right to consume a certain quantity of water Phillips has no right to any part of it, although he might actually get it if Sweeney was compelled by circumstances or should choose to let it flow by him. Moreover, if it is a fact that it would be an advantage to Phillips if Sweeney used his water on his land, such fact is not established by the decree, and neither this court nor the district court is authorized to assume it. The right of Phillips that he should so use it, if any such exists, is not sanctioned by the injunction, and we are not authorized *ex post facto* to enlarge the terms of the injunction for the purpose of trapping Sweeney into a crime. The mere fact that Phillips may have been damaged does not convict Sweeney of contempt. To be a contempt the injury must have been caused by a forbidden act.

Assuming, then, that Sweeney has never been prohibited by any lawful order of court from selling his sixteen-hundredths of the stream in Carson city, how does the case

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stand? He is accused in the affidavit of two acts alleged to be contempts of court, of excessive diversion and of diversion to Carson city. One of these acts is in violation of the order of the court, and the other is not. One it has authority to punish; the other it has no authority to punish. Suppose, then, it has tried both charges together, found the defendant guilty generally and imposed a lumping fine, how can it ever be ascertained what part of the fine was apportioned to the innocent, and what part to the guilty act? And if the court, along with the case which it had authority to try, has tried another case beyond its jurisdiction, and has blended the two proceedings together so that they cannot possibly be disentangled, can it be said that the jurisdiction of the court has not been exceeded? It seems to my mind clear that in such a case, the fact clearly appearing that there has been an excess of jurisdiction, the whole proceeding must fall together. This is the result that follows from the position of respondent: That we can look at nothing but the findings of the court, and that they show a conviction of Sweeney on both charges. But the findings of the court do not convict him on both charges. They are quoted in the opinion of the chief justice.

No. 1 finds that Sweeney was diverting from the stream and conducting to Carson about forty inches of water; but there is no finding—and there can be no presumption or intendment in aid of a special verdict in a criminal case (and that is what these findings are)—that forty inches are sixteen-hundredths of the stream.

No. 2 amounts at most to this: That at the time of the decree Sweeney had no right to the water which he was conveying to Carson. Suppose he had no right to that water, what was to prevent him from doing what he afterward did, take the water he was entitled to for irrigation and bring that to Carson?

No. 3 finds that Phillips was deprived of water and thereby injured. But if Sweeney was not taking more than he was entitled to, then it was not by Sweeney but by some one else that Phillips was injured.

No. 4 finds that while Sweeney was diverting water to

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Carson the land, in connection with which the water had been awarded to him, was leased to Authers by a lease containing no reservation of the water. It is upon this finding that the whole argument of the respondent is built, and it is briefly this: The effect of the decree was to declare or to make the water parcel of, or appurtenant to, the land, and a lease without reservation of the water carried the water with it, and left Sweeney no right to any portion of the water, so that any diversion by him was an excessive diversion. This argument has been already partially answered. The decree does not, and could not, make sixteen-hundredths of the stream parcel of or appurtenant to the land. The right of a riparian proprietor to have a running stream flow as it has been accustomed to flow, and to use the water for domestic purposes and for watering stock, is parcel of the land, and passes by a conveyance of the land unless expressly reserved. This may be true, also, of that portion of a stream which has been appropriated for irrigating land, if the conveyance is made while that use of the water is continued. But, as has been shown, a person who appropriates water for one use may change the use at pleasure. If he takes it in the first place for irrigation, he may, if he finds it to his advantage, conduct it away in pipes and sell it; and if he does so change the use, and afterwards conveys the land, the water so appropriated does not pass with the land any more than a house would pass with the land because it had once stood on it, if it had been removed before the land was sold. The owner of land may, while he is the owner, remove from it not only those things that have been added to it by the hands of man, but even the substance of the soil, and a grantee of the land will take only what is left on the land at the date of the sale. Say then that the sixteen-hundredths of the water of the stream had been annexed to Sweeney's land by an act of appropriation (by which means alone they could have been so annexed), there is nothing in the findings to show that before he leased to Authers he had not changed the use; there is nothing to show that he had not Authers' license to use a part of the water belonging to the land, if it did

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still belong to it; and there is nothing to show that he and Authers together used as much as sixteen-hundredths of the stream.

No. 5 shows that another parcel of land, of which Sweeney had acquired title after the decree, was being occupied and cultivated, and all the water awarded to it in the decree used in connection with it. This finding that all the water awarded to the Quill ranch was being used to irrigate it, stands in significant contrast to the finding that Sweeney's tenant, Authers, was using *some* water on the Sweeney ranch, and proves that the court no more intended to find than it did actually find that Sweeney and Authers together were using more water than had been allotted to Sweeney.

I repeat, therefore, that the findings of the court, construed as a special verdict in a criminal case should be construed, do not establish facts from which it can be inferred that Sweeney diverted a drop more of the water of the stream than he had a right to divert. They are perfectly consistent with the oral decision that he was innocent of that charge.

It is constantly assumed throughout the opinion of the court that it is necessary to resort to the evidence in the case to retry it on its merits, to convert the writ of review into a writ of error in order to be able to see that Sweeney was not convicted of excessive diversion of water, and was convicted and fined for diverting water to Carson. I believe I have sufficiently shown that an examination of what is conceded on all sides to be a part of the record in the case—that is, the written findings of the court—will show that Sweeney was acquitted on the first and convicted only on the second charge. I believe, moreover, that I have shown by the authority of a case directly in point that the oral decision of the court is properly a part of the record before us, under the stipulation of the parties, and that it clearly expresses what is alone inferrable from the written findings.

Assuming it to have been shown that Sweeney's diversion of his share of the water to Carson was no violation of the

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decree or injunction, and that he was tried and convicted of that charge and no other, I shall proceed to inquire whether the district court, in so trying and convicting him, exceeded its jurisdiction.

There ought to be no doubt or question, it seems to me, that a court, however extensive or general its jurisdiction in other respects, is, with respect to its power to punish for contempts, of special and strictly limited jurisdiction. The process is summary. There is no right to a jury trial, and there is no appeal. Necessity alone can justify the conferring of such arbitrary power upon any tribunal, and the extent of the power is accordingly limited by the extent of the necessity. Every court has power, by summary process, to punish contempts of its authority; but if it punishes by that process an act which is not a contempt, it exceeds its jurisdiction. Whenever a charge of contempt is laid before a court, it must compare the facts alleged with the law, or the order which defines the contempt, and decide *in limine* whether they constitute a violation of such law or order. If they do, the court has jurisdiction to proceed, and an error in deciding any question of law that may incidentally arise in the course of the trial, or in finding the person accused guilty on insufficient evidence, or against the weight of evidence, will be an error merely, and not an excess of jurisdiction. But if the facts alleged do not constitute a contempt, the court has no jurisdiction to proceed, and if it erroneously decides that a contempt has been charged, and does proceed with the case, the error in deciding that a case has been presented within its jurisdiction is not merely an error, it is an error that involves an excess of jurisdiction. Every excess of jurisdiction is an error, though every error is not an excess of jurisdiction. This is a distinction which, it seems to me, has been too little attended to in the opinion of the court, where it is in effect held that, the district court being obliged to decide whether the facts found constituted a breach of its order, an erroneous decision on that point was an error merely, and not an excess of jurisdiction.

The case of *Batchelder v. Moore* (42 Cal. 415), establishes the principle for which I am contending: "If there be no

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affidavit presented, there is nothing to set the power of the court in motion; and if the affidavit, as presented, be one which, upon its face, fails to state the substantive facts which, in point of law, do or might constitute a contempt on the part of the accused, the same result must follow," etc. The authority and correctness of that decision are conceded in the opinion of the court, and it is greatly relied on as sustaining the conclusions reached in this case. I think that, so far as it goes, it is directly against those conclusions. If Sweeney had been charged with nothing but a diversion of water to Carson city in the affidavit, and if that was not a violation of the decree, then, according to *Batchelder v. Moore*, the court would have had no jurisdiction to try him. So much, at least, it establishes. But it is said Sweeney was charged with substantive facts (the diversion of too much water) which were sufficient to set the power of the court in motion, and, therefore, the decision in *Batchelder v. Moore* shows that it had jurisdiction to proceed. I do not see that that decision establishes anything of the sort. It decides that one thing is an excess of jurisdiction, but it does not decide that nothing else can be. To say that a court exceeds its jurisdiction in trying a man for contempt, when no contempt has been charged, does not imply that if a contempt is charged a court may not exceed its jurisdiction if it ignores the charge made and tries him for something else. Can a court try and convict a man of an offense of which it has no jurisdiction merely because it has been artfully charged in connection with an offense of which it has jurisdiction? Does the power of a court once put in motion acquire such fearful headway as to reach everything outside of its proper limits?

Suppose that instead of one affidavit there had been two, one charging Sweeney with excessive diversion of water and the other with diverting water to Carson. Would the charge made in the first have authorized the court to try and convict him on the second? If not, what difference does it make that both charges are embraced in one document instead of two?

I am thus brought back to the point from which I started.

Points decided.

If it is desired to convict a man of a charge of which a court has no jurisdiction, all that is necessary is to couple with it another charge of which the court has jurisdiction. This will set the power of the court in motion, and it can then ignore the charge of which it has jurisdiction, and try, convict, and fine the person accused on the other charge; and although this may clearly appear, certiorari will afford no remedy.

This is a doctrine to which I cannot assent. I think the judgment of the district court should be set aside.

[No. 826.]

**JOHN McCAUSLAND, APPELLANT, v. A. J. RALSTON,
ADMINISTRATOR OF THE ESTATE OF T. F. SMITH, DECEASED,
RESPONDENT.**

AMENDMENTS OF PLEADINGS—DISCRETION OF COURT.—A party wishing to amend his pleading ought, as a general rule, to ask leave of the court to amend when objections to the sufficiency of the pleadings are made, and before the introduction of testimony; but courts in allowing amendments are necessarily clothed with discretionary power, and whenever an offer is made to amend at any such stage of the proceedings, that the opposite party will not lose an opportunity to fairly present his case; it cannot be said that the court has abused its discretion in allowing an amendment.

STATUTE OF FRAUDS—PROMISSORY NOTE—HINDERING, DELAYING AND DEFRAUDING CREDITORS.—In a suit, brought against the administrator of a deceased person, to recover the amount due upon a promissory note, the defendant should be allowed to allege and prove that the note was made and delivered to plaintiff without consideration, for the sole purpose of protecting the property of the deceased from his creditors, and that it was agreed between plaintiff and said deceased at the time of the execution of said note that it should be canceled whenever so desired.

IDEM—ILLEGAL CONTRACTS.—Courts will not aid either party in enforcing an illegal *executory* contract; nor if executed will they aid either party in setting it aside, or in recovering back what has been passed under it. Whenever an executory contract is tainted with fraud, the courts refuse to enforce it, and it makes no difference whether the fraud is shown by plaintiff or defendant.

IDEM—PAYMENTS, HOW CREDITED.—Where plaintiff held several promissory notes against the deceased, all but one being valid, and also held certain shares of mining stock belonging to deceased: *Held*, that, in the absence of any showing to the effect that the deceased ever authorized plaintiff to appropriate the proceeds derived from the sale of such stock toward the dis-

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charge of the fraudulent note, the law compelled plaintiff to credit the money upon the valid notes.

REFRESHING MEMORY OF A WITNESS.—Where a witness testifies that he has no way of fixing dates except by referring to a book of original entries made by himself, and further testifies that the entries were made at the time of the occurrence, and that the dates were correct: *Held*, that he should be allowed to examine the book for the purpose of refreshing his memory, and should be allowed to testify to the dates. Such testimony is not hearsay.

TENDER—COSTS.—After the commencement of the trial the defendant tendered to plaintiff an amount of money largely in excess of the amount recovered by him: *Held*, that defendant is entitled to recover all costs that accrued after the tender was made, and all other costs relating specially to the fraudulent note.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts sufficiently appear in the opinion of the court.

Lewis & Deal, for Appellant:

I. The evidence of fraud in the execution of the note was inadmissible, because the note, although void as to creditors, was perfectly good as between the parties. The statute of this state does not make such an instrument absolutely void; but only so as to creditors. (1 Comp. L. secs. 297, 298, 299, 300.) When the statute expressly declares that such instrument as against the persons, hindered, delayed, or defrauded, shall be void, can anything be clearer than that it was not intended that it should be void, except as against such persons? When the legislature declared certain instruments void as to certain designated persons, it did not intend that they should be void except as against such persons. The expression of one thing is an exclusion of all others. The mention of certain persons excludes all other persons. If the legislature intended to make such instruments absolutely void, so that they could not be enforced at all, it would have declared them to be absolutely null and of no effect, instead of only declaring them to be void as against certain specified persons. But independent of the evident meaning of the statute, we think the reason and theory of the law warrants only this view. It has always been a maxim of our jurisprudence that a man shall

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not be heard to plead his own fraud; and the English courts from the earliest time have refused to hear a suitor who sought to avoid the consequences of his acts by showing his own turpitude. Again, to allow a man to take advantage of his fraud, is to further his corrupt purpose; for he may, as in this case, simulate debts to get advantage of his creditors, and when he has consummated his purpose then ask and obtain relief of the courts from the very corrupt acts whereby he succeeded in deceiving or defrauding them. The courts should so construe the law, if possible, as to make it hazardous for dishonest persons to even attempt a fraud; and that can in no wise be so effectually accomplished as to inforce fraudulent instruments against them. But, independent of these considerations, the great weight of decisions are in our favor. Every decision holding that a person shall not be allowed to show his own fraud to defeat a conveyance, is equally an authority that he shall not do so to defeat any other instrument. No distinction can be made under the statute between different instruments. All instruments are grouped together in the statute, and the same language is used respecting them all; hence, if a conveyance to defraud creditors be good and valid between the parties, so must any other instrument executed for the same purpose be so. Under the statute of 13 Elizabeth, no English court has ever held any such instruments as are mentioned in the act to be void between the parties, nor can we find any case in this country holding a conveyance or executed contract to be so; and as the statute does not warrant any distinction between such instruments, the courts have no right to make it. (32 Ind. 486; 8 Porter, Ala. 351; 1 Blackf. 262; 18 Me. 231; 9 B. & C. 532; 4 Mass. 354; 5 Mass. 109; 5 Binn. 109; 20 Pick. 247; 3 Watts & S. 255; 22 Id. 253; 3 Mason, 378; 36 Me. 47; 13 Penn. St. 488; 1 Ohio, 469; 4 Ired. 102; 2 Southard, 738; 2 Halsted, 173; 10 Conn. 69; 28 Wis. 637; *Phillpots v. Phillpots*, 10 Com. Bench. 85; *Roberts v. Roberts*, 2 Barns & Ald. 376; 1 Smith's Lead. Cases, 699, 702-703; 12 Harris, 62; 1 Casey, 441; 34 Cal. 81; 7 Exch. 780; 11 Serg. & R. 164; 1 W. Black. 364; 6 Watts, 453; *Stewart v. Iglehart*, 7 Gill.

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& J. 132; *Sedwick v. Sedwick*, 6 Gill. 29; 5 Md. 44; 4 Md. 435; 16 Penn. St. 58; 1 Day, Conn. 136; 29 Texas, 450; 8 Conn. 62; 19 N. J. 42.)

II. Fraud must be specifically and minutely pleaded. (Kerr on Fraud and Mistake, 365; 39 Cal. 123; 30 Cal. 673.)

III. It was error for the court to allow evidence contradicting the admissions of the answer. And this was not cured by the fact that the answer was afterward amended. The court compelled us to try the case on the answer as it originally stood. We had the right to believe that the fact that the note and bill of sale were executed on different days was admitted; upon that belief we went to trial, but without any amendment defendant was allowed to prove differently. We contend that if an objection be made to evidence on the ground that the pleadings do not admit of, the pleader must then ask to amend, and that he cannot go on and try his case, the evidence being improperly admitted, and then cure such error by afterward amending his pleading.

V. Small's book was inadmissible in evidence, because it was not such book as is allowed in evidence. (1 Greenleaf on Ev., secs. 118-19 and note.)

VI. Small's testimony as to the date the horses left his ranch was inadmissible, because he had no recollection of such dates even after an examination of his memorandum. (1 Greenleaf on Ev. secs. 436 *et seq.*)

VII. The money paid on a fraudulent contract cannot be recovered back; therefore the court erred in this case in compelling the plaintiffs to apply such money on the other notes; for it amounted to nothing but allowing the defendant to recover money paid on such contract. (See authorities on first point, and also 23 N. H. 128.)

VIII. Costs cannot be awarded against one who recovers judgment as in this case, unless he not only makes an actual tender, but pleads it.

M. N. Stone, for Respondent:

I. The court below did not err in admitting the testimony of the witness, Mrs. Smith. The answer and amendments

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thereof set up valid defenses to the action. The defense of want of consideration is valid, as shown by the following authorities: 2 Parsons on Notes and Bills, 501-2; 521-2; 6 Parsons on Contracts, 249 and authorities cited; *Wearse v. Peirce*, 24 Pick. 143; *Barker v. Prentiss*, 6 Mass. 433; *Dickinson v. Lewis*, 34 Ala. 638; *Harwood v. Knapper*, 50 Mo. 457; *Tucker v. Smith*, 4 Green (Me.) 418.

The point made, that we have the right to plead and prove fraud in the execution of the note, is sustained by the following authorities, which announce the long-settled law upon the subject: *Nellis v. Clarke*, 20 Wend. 24; *Goudy v. Gebhart*, 1 Ohio St. 362; *Walker v. McConnice*, 10 Yerg. (Tenn.) 228; *Smith v. Hubbs*, 1 Fairf. (Me.) 71; *Hoover v. Pierce*, 27 Miss. 13; *Holeman v. Johnson*, 1 Cowp. (Eng.) 341; *Randall v. Howard*, 2 Black. (N. J.) 585; *Valentine v. Stewart*, 15 Cal. 387; *Ager v. Duncan*, 50 Id. 327; *Collins v. Blantern*, 1 Sm. Lead. Cases, part 1, 700-4; *Harwood v. Knapper*, 50 Mo. 457; *Briggs v. Merrill*, 58 Barb. 396; *Nellis v. Clarke*, 4 Hill. 426; *Hamilton v. Scull's Administrator*, 25 Mo. 166; *Fenton v. Ham*, 35 Id. 409; *Welby v. Armstrong*, 21 Ind. 489; *Mosely v. Mosely*, 15 N. Y. 335; *Tucker v. Smith*, 4 Green. (Me.) 418; *Bailey v. Foster*, 9 Pick. 140; *Powell v. Truman*, 8 Jones (N. C.) 436; *Church v. Muir*, 33 N. J. 319; *Harvin v. Weeks*, 11 Pick. (S. C.) 601; *Norris v. Norris, Adm'r*, 9 Dana, 318; Bump on Fraud. Conv., 449.

II. The note is illegal and void under the statute of Nevada. (1 Comp. Laws, Mo., sec. 2441; *Collins v. Blantern*, 1 Lead. Cases, part 1, 676-8, and cases cited.)

III. The defenses of want of consideration are sufficiently pleaded in the answer and amendments. (*Collins v. Blantern, supra*, 688-9.)

IV. Small's evidence showing the dates he received and returned the horses was admissible. (*Merrill v. R. R. Co.*, 16 Wend. 586; *Bank v. Culver*, 2 Hill, 531; 19 Wend. 162; 1 Rawle, Penn., 152; *Davenport v. Cummings*, 15 Iowa, 219; 1 Green. on Ev., 115-16, and cases cited; *Bunker v. Shed*, 8 Met., (Mass.) 150.)

V. The amendments to the answer were properly allowed

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by the lower court. They were allowed in furtherance of justice and in order to make the pleadings conform to the proofs introduced by defendant. Such amendments are always allowed under our system of practice. If they operated as a surprise to plaintiff it was his privilege to ask for a continuance which he failed to do. They did not however operate as a surprise. The facts disclosed by the amendments were from the beginning of the suit fully known to plaintiff. (1 Comp. Laws, secs. 1131-33-34; *Tryon v. Sutton*, 13 Cal. 494; *Pierson v. McCahill*, 22 Cal. 131; *Kirstein v. Madden*, 38 Cal. 162.)

VI. The denial "upon information and belief" in the amendment to the answer is sufficient. (*Kirstein v. Madden*, 38 Cal. 162, and cases cited.)

VII. The tender and payment into court of more than the amount of money due plaintiff was sufficient. At all events the judgment would only be modified in respect to costs if such payment was not sufficient. The judgment will not be reversed on that ground alone if correct in all other respects. (*Union Water Co. v. Murphy F. F. Co.*, 22 Cal. 632; 1 Comp. L., sec. 1400; *Choteau v. Suydam*, 21 N. Y. 185; 15 How. 315; 20 How. 215.)

VIII. There was no money paid by the deceased on the fraudulent note sued on. There is no evidence in the case showing such fact; nor is there any evidence in the case tending to show that appellant had any authority from any one to credit any money received by him from deceased upon such note.

IX. Conceding, for argument sake, that the statute of frauds does not make the note invalid, still we claim the plaintiff could not recover by force of the provisions of section 2441, 1 Compiled Laws. The purpose of this act is not only to punish but to prohibit the making of the contracts mentioned therein. It is not necessary that such purpose should be expressed in words. (*De Bergins v. Armistead*, 10 Bing. 107; *Bartlett v. Vinor*, Carth. 252; 1 Smith's Lead. Cases, 681; Story on Prom. Notes, 6 Ed., sec. 189; *Davenport v. Cummings*, 15 Iowa, 225.)

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By the Court, HAWLEY, C. J.:

This action was brought by plaintiff to recover the sum of twenty-two thousand eight hundred and twelve dollars and fifty-nine cents, alleged to be due upon certain promissory notes executed and delivered to him by T. F. Smith, since deceased.

The only controversy between the parties is as to the validity of one note in the sum of sixteen thousand dollars. The defendant claims that this note was made and delivered to plaintiff, without consideration, for the sole purpose of protecting the property of the deceased from one George T. Marye, who had instituted an action against him to recover a large amount of money; that it was understood and agreed between plaintiff and said deceased at the time of the execution of said note that it should be canceled whenever so desired, and that the same was not to be held by plaintiff as a valid note against him. This note is alleged in the complaint to have been executed and delivered on the first day of July, 1874. The original answer refers to it as "bearing date on the first day of July, 1874."

When the defendant offered testimony tending to establish the fraud in the execution of the note, the plaintiff objected to its introduction, among other reasons, upon the ground that the facts and circumstances constituting the fraud were not sufficiently pleaded. As a circumstance tending to establish the fraud the defendant offered testimony to prove that the note was made on a different day from its date, and that it was, in fact, executed and delivered to plaintiff on the same day as a certain bill of sale conveying to plaintiff three horses, in furtherance of the fraudulent purpose before mentioned, to wit: in August, 1874, and that after Marye had been defeated in his action, plaintiff had voluntarily surrendered the horses described in the bill of sale to said Smith prior to his death. Plaintiff objected to any evidence tending to show that the note was antedated, upon the ground that the answer admitted that the note was executed on the day it bore date.

The court overruled all of plaintiff's objections, and

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allowed the defendant to introduce his testimony under the original answer.

During the progress of the trial, and after the testimony tending to establish the fraud had been admitted, the court allowed the defendant, against the objections of plaintiff, to amend his answer so as to conform to the proofs in the several respects wherein it was claimed to be deficient, and among others, the court allowed defendant to amend his answer so as to deny that the proceeds of one hundred shares of Overman stock were ever, by the direction of said T. F. Smith, credited on the sixteen thousand dollar note.

The plaintiff having only recovered a judgment for three thousand eight hundred and twenty-seven dollars and eighty-three cents, appeals from the judgment and also from an order of the court refusing him a new trial.

1. It is claimed by appellant that the court erred in allowing the amendments to the answer to be made after the testimony had been introduced.

Undoubtedly the best course for defendant to have pursued, if he doubted the sufficiency of the averments in his answer to sustain the proofs he intended to offer, would have been to have asked leave of the court to amend at the time plaintiff's objections were made. But the course pursued in this case, although unusual and irregular, does not authorize us to set the judgment aside.

Courts, in allowing pleadings to be amended, are necessarily clothed with discretionary power which cannot, owing to the varying circumstances of each particular case, be governed by any general rule. The vital question is whether the court has grossly abused its discretion in this respect, or whether, by the allowance of the amendments, manifest injustice has been done to appellant. The defendant, in asking the amendments at the time he did, must, in the absence of any showing to the contrary, be presumed to have offered to submit to any terms which the court might see fit to impose. There is no showing that appellant was misled to his prejudice, or that he was deprived of introducing any testimony that he might wish to offer in consequence of the amendments, or of the right to move for a continuance.

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If he was surprised, he ought to have moved the court for a continuance. This court has always been quite liberal in sustaining the action of the lower courts in allowing or refusing amendments to pleadings, to the end that substantial justice may be done between the parties.

The same rule prevails in California. (*Peters v. Foss*, 16 Cal. 357; *Lestrade v. Barth*, 17 Cal. 289; *Pierson v. McCahill*, 22 Cal. 130; *Stringer v. Davis*, 30 Cal. 318; *Clark v. Phoenix Ins. Co.*, 36 Cal. 168; *Kirstein v. Madden*, 38 Cal. 162.)

In *Lestrade v. Barth*, the court say: "We have repeatedly held that it is within the power of the court below to grant amendments whenever, at any stage of the trial, they are necessary to the purposes of justice."

In *Kirstein v. Madden*, the court say: "When an offer to amend is made at such a stage in the proceedings that the other party will not lose an opportunity to fairly present his whole case, amendments should be allowed with great liberality."

The amendments allowed in this case were authorized by section 68 of the civil practice act, and as it does not in any manner affirmatively appear that appellant suffered any injury thereby, the judgment will not, upon this ground be disturbed.

2. Appellant contends that the evidence of fraud in the execution of the note was inadmissible, because the note, although void as to creditors under the statutes of this state, was valid as between the parties. The language of the statute is as follows: "Every conveyance or assignment, in writing or otherwise, of any estate or interests in lands, or in goods in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suits commenced, decree or judgment suffered, with the like intent, as against the persons hindered, delayed, or defrauded, shall be void." (1 Comp. L. 297.)

The argument of appellant is, that the legislature having

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declared the contract void as against creditors, the maxim *expressio unius est exclusio alterius* applies, and that it was the intention of the legislature only to make such contracts void as to creditors, leaving them valid as between the parties. It is also claimed that the reason and theory of the law, independent of the meaning of the statute, sustain the position that no man shall ever be allowed to plead his own fraud, and, finally, it is contended that the great weight of the decisions support the views expressed by appellant, and numerous authorities are cited to the effect that a conveyance made to defraud creditors, though void as to creditors, is good as against the grantor and his heirs.

This general proposition is sustained by all the decided cases. But counsel for respondent, while admitting the correctness of the rule as applied to executed contracts, contends that the rule is different when applied to executory contracts. Whether there is any difference in the rule in this respect is the hinge upon which the whole controversy upon this point must eventually turn. Upon the part of appellant it is claimed that where the fraudulent transaction does not appear upon the face of the instrument, but is interposed by way of defense, the defendant becomes the actor, and the maxim *in pari delicto* applies against him and not in his favor.

Upon the part of the respondent it is claimed that courts will not aid either party in enforcing an illegal executory contract: nor if executed will they aid either party in setting it aside, or in recovering back what has passed under it; that when the parties to an illegal or fraudulent contract are *in pari delicto* the law will not be the willing instrument of its own subversion, and to every appeal for assistance replies *in pari delicto, portior est conditio defendantis*.

It must be admitted in the outset that there is a great diversity of opinion upon the question. Although very few of the authorities cited by appellant discuss the point whether there is any difference in the rule when applied to executory contracts, yet the reasons stated for the rule are in some of the cases, certainly applicable to executory as

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well as executed contracts. Especially is this true of the reasoning of several of the cases decided in Pennsylvania and some of the authorities found in Massachusetts.

Moreover, some of the decisions in other States were rendered in cases where the contract sued upon was executory, and the opinions are based solely upon the general rule as applied to executed contracts.

We are of opinion that much of the confusion has arisen from the fact that courts have often given a reason that was not called for by the facts of the case, and have failed to consider the question whether or not there was in fact any difference in the rule when applied to executory contracts.

The true value of any decision as an authority entitled to consideration is its applicability to the facts of any given case, as well as the principles of law involved therein.

We have examined all the English cases cited by counsel. They shed but little light upon the real question involved in this case.

It may, for the purposes of this opinion, be admitted that the statute of this state is substantially the same as the statute of 13 Elizabeth, although from a comparison of that statute found in 4 Bac. Abr. 401, we think its language gives further support to the position contended for by appellant than is found in our statute. It declares that certain enumerated conveyances, contracts in writing, etc., etc., devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors, "shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heroits, mortuaries and reliefs, by such guileful, covinous, or fraudulent devices and practices, as is aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded,) to be clearly and utterly void, frustrate and of none effect; any pretense, color, feigned consideration, expressive of use, or any other matter or thing to the contrary notwithstanding."

Now, it might with some force be argued that the word

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only, as it appears in this statute, implies that, as between everybody but the creditors; the transactions mentioned therein should be valid, while the statute of this state simply declares that such contracts as against creditors shall be void and leaves the question as to the rights of the parties to be determined by the courts without any such implication. We only refer to this distinction for the purpose of showing that the statute of 13 Eliz. is certainly as favorable for appellants as are the provisions of our statute relating to the same subject.

The statutes of nearly all the states from which authorities are cited are either similar to the statute of this state, or have been by the decisions in the respective states declared to be substantially the same as the statute of 13 Eliz. The statute of 13 Eliz. is held in some of the cases to be either declaratory of the common law or an enlargement of its principles. In none of them is it claimed to be in derogation of the common law.

After examining all the authorities and considering the reasoning of the respective decisions, we are clearly of the opinion that the weight of reason and authority is decidedly opposed to the views contended for by appellant.

One of the earliest cases in the United States is that of *Smith v. Hubbs*, which was an action of assumpsit for goods sold and delivered. The facts show that the transaction was a fraudulent sale by a debtor to conceal his property from his creditors. It was there, as here, argued that no man could defend himself by alleging and proving his own turpitude; that when a plaintiff has proved the contract on which he has declared, and which appears to be fair and legal, the defendant shall not be permitted, by way of defense, to prove that the contract was fraudulent and illegal between the plaintiff and himself, and thus avail himself of his own wrong and violation of law. The court, in answering this argument, said: "There is a marked and settled distinction between executory and executed contracts of a fraudulent or illegal character. Whatever the parties to an action have executed for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb.

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Whatever the parties have fraudulently or illegally contracted to execute, the law refuses to compel the contractor to execute or pay damages for not executing, but in both cases leaves the parties where it finds them. The object of the law in the latter case is, as far as possible, to prevent the contemplated wrong; and in the former, to punish the wrongdoer by leaving him to the consequences of his own folly or misconduct." (1 Fairf. 76.)

The subsequent cases of *Potter v. Yale College* (8 Conn. 52), and *Chapin v. Pease* (10 Conn. 69), cited by appellant, proceed upon other grounds, and do not in any manner, in our judgment, affect the doctrines enunciated in *Smith v. Hubbs*.

The supreme court of Tennessee, in *Walker v. McConnico*, decided that a promissory note, executed without consideration, and with the view to protect the maker's property from his creditors, could not be enforced by the payee against the maker. The court say: "The note having been made, and the deed of trust executed, to defraud creditors, the defendant cannot resist the execution of the trust according to the terms of the deed. But as the note was without consideration, and was executed to hinder and delay creditors, the promise to pay being executory, cannot be enforced." (10 Yerg. 229.)

Next comes the decision in *Nellis v. Clark*, where the question was whether a promissory note given in payment for property purchased with the intention to defraud creditors could be enforced. This question seems to have been very thoroughly considered. A majority of the court (Nelson, C. J., dissenting) sustained the rule laid down in *Smith v. Hubbs*. The failure of consideration is ignored and the decision is based upon the grounds of the common law. It was held that under the statute all contracts, both executory and executed, to defraud creditors were void only as against the creditors, and that under the statute of New York as well as the statute of 13 Elizabeth, the parties were excluded from its operation and left as they stood at the common law. Cowen, J., in delivering the opinion of the court quotes with approval the language of Lord Mansfield,

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in *Holman v. Johnson* (1 Cowp. 341), as follows: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for, where both are equally in fault, *potior est conditio defendentis*," and adds: "These remarks cover the whole ground on which Clark, the defendant, stands. * * Neither he nor Buttolph have any positive remedy on their own account. But as the law finds them, so it will leave them. They derive that kind of negative assistance which arises from their cases, being mutually such that the law will not tarnish its hands by recuring them from the mire." (20 Wend. 32.)

This opinion was affirmed in the court of errors (*Nellis v. Clark*, 4 Hill, 424), and the principles it enunciates have ever since been recognized as sound law by the courts of that state. (*Mosely v. Mosely*, 15 N. Y. 334; *Briggs v. Merrill*, 58 Barb. 399.)

In Kentucky, the same rule prevails: *Jones v. Read*, 3 Dana. 541; *Norris v. Norris*, 9 Dana. 318; so in South Carolina: *Harvin v. Weeks*, 11 Rich. 601; and in North Carolina: *Powell v. Inman*, 52 N. C. 28; *Powell v. Inman*, 53 N. C. 437; and Mississippi: *Hoover v. Pierce*, 27 Miss. 13; *Wallon v. Tusten*, 49 Miss. 569; in Missouri: *Hamilton v. Scull's*

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Adm. 25 Mo. 166; *Fenton v. Ham*, 35 Mo. 409; *Harwood v. Knapper*, 50 Mo. 457; in Ohio: *Goudy v. Gebhart*, 1 Ohio St. 263; *Bradford v. Beyer*, 17 Ohio St. 388; and New Jersey: *Church v. Muir*, 33 N. J. 319.

The court, in *Hamilton v. Scull's Administrator*, decided that it was a good defense to an action upon a promissory note, that it was given by the defendant to plaintiff to enable the plaintiff to hinder, delay, and defraud his creditors. Scott, J., in delivering the opinion, says: "There is no doubt of the correctness of the principle asserted in the case of *Brown's Administrator v. Finley* (18 Mo. 375), that one who has made a fraudulent conveyance of his property cannot, by alleging his own turpitude, be permitted to set aside his conveyance, and regain the possession of property which he has fraudulently aliened. To do this would be encouraging fraud, for thereby a party would be induced to make fraudulent alienations without any concern for the consequences, confiding in the privilege the law would confer of setting them aside afterward if they did not answer the ends proposed by them. In such cases the maxim applies, *nemo allegans suam turpitudinem est audiendus*. Having fraudulently passed away his property, the act is consummated; the deed is done, and the law will not relieve him from a situation in which he has been placed by his own fraud. But the case under consideration is different from that stated above. Here, the act is not consummated. This is but a promise, and the law allows the turpitude of the transaction to be shown with the same view as in the preceding case, to take away inducements to fraudulent conduct. What would give greater encouragement to fraud than for courts of justice to lend their aid in carrying them into execution? But, though the law suffers the transaction to be inquired into in the one case, and will not permit a party to expose his fraud in the other, yet this apparently inconsistent course arises from the different stages of the illegal acts at the time the inquiry is proposed, and is necessary to fulfill the purpose of the law with regard to fraudulent contracts, which is to refuse all aid to the parties thereto in carrying them into execution, for it will be ob-

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served that in this case, while the law permits a party to raise the question of fraud, it is only done that it may, when the fact is established, refuse its aid to the party who has been concerned in it, and leave him just where he placed himself by his ill conduct. So in the end * * * the law produces the same result in each case, which is a denial of all assistance to those who will soil themselves with a foul transaction." (Chitty on Contracts, 680.)

It is true that in Ohio the statute is different in its terms from the statute of this state or that of 13 Elizabeth, in that it enacts that the conveyances, etc., "shall be deemed utterly void and of no effect." But Thurman, J., in delivering the opinion in *Goudy v. Gebhart*, *supra*, disapproves the doctrine announced in *Findley v. Cooley*, 1 Blackf. 262, and quotes, with approval, the views expressed by the courts in *Nellis v. Clark*; *Smith v. Hubbs*, and other cases where the distinction between executed and executory contracts is observed, and declares that the court would have no hesitancy in following the rule as therein announced, even if the statute of frauds was precisely similar to that of Elizabeth. He refers to *Burgett v. Burgett* (1 Ohio, 469), where the court held that a conveyance executed for the purpose of defrauding creditors was void only as against creditors, and says that the question whether an executory contract made to defraud creditors could be enforced was left untouched, notwithstanding some of the reasoning of the court which ought not to be extended beyond the point there decided. And in closing the opinion the learned justice says: "Another question remains to be considered, namely: whether the defense in question is limited to cases where the facts are disclosed by the plaintiff's testimony. It is a maxim of the law, counsel say, that no one shall be permitted to aver or prove his own turpitude; and some elementary works and cases are cited where the proposition is thus stated. But an examination of the authorities will show that this statement is too broad. The true rule is that no one is allowed to set up his own iniquity to defeat an innocent person. But where the parties are *particeps criminis* the proof may come from the defendant."

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The statute of New Jersey is substantially the same as the statute of 13 Elizabeth.

In *Church v. Muir, supra*, it was held that a note arising out of a contract designed to hinder or defeat the claims of creditors was invalid, and could not be enforced in a court of law between the parties. Beasley, C. J., in delivering the opinion of the court, which was concurred in by all the justices, fully answers the argument of counsel, that the statute for the prevention of frauds does not invalidate the transaction except so far as it concerns the creditors, in language directly applicable to the facts of the case under consideration. He says: "It is certainly true, the statute referred to does not, *proprio vigore*, annul beyond the extent thus defined, the conveyances and contracts at which it is leveled. Nothing more than this was necessary to effect its purpose, which was the relief and protection of creditors against this class of frauds. But it is also clear that it has no tendency to legalize any act which was not legal at the time of its enactment. So far as respected creditors, it was an authoritative declaration, which removed all doubts that the contrivances denounced should be inoperative and void, but as to their effect upon the rights of other persons the act is silent. The result is, that a demonstration that the statute in question does not define the rights of the parties to contracts which are void on account of their hostility to creditors does not by any means conclude the present inquiry, because the question still remains, how do such contracts stand with regard to the general principles of jurisprudence?"

A contract, the purpose of which is to protect a debtor against the just claims of creditors, is an immoral act. Such an affair is inimical to social policy. It is in direct opposition both to the letter and spirit of the statute for the prevention of frauds.

In *Cadogan v. Kennett* (2 Cowp. 434), Lord Mansfield very truly remarked: "That the principles and rules of the common law, as now universally understood, are so strong against fraud in every shape that the common law would have attained every end proposed by the statutes." (13

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Eliz., ch. 5, and 27 Eliz., ch. 4.) And there can be no doubt that the things prohibited by these statutes, from their inherent unlawfulness, would have been judicially annulled in favor of creditors. But if this is their character, on what ground can a party to one of these transactions ask a court of law to lend its aid to its inforcement? The general rule undoubtedly is, that courts will not assist a party either to execute or to undo an illegal transaction. If the forbidden agreement has been executed the parties are left where they have placed themselves; if it remains executory, its performance cannot be legally compelled. The principle is embodied in the old common law maxim: *ex turpi causa non oritur actio*. The rule has a wide scope, for it takes away all legal help from all contracts, whether under seal or by parol, which stipulate for the performance of an immoral act, or any act contrary to the provisions of a legislative act, or to the public policy of the common law. It is not necessary to refer to adjudications in support of a principle so universally admitted. The only doubt that can possibly be suggested is as to its application to a bargain made in fraud of creditors.

In the case of *Nellis v. Clark* (20 Wend. 37), Chief Justice Nelson, in a dissenting opinion, endeavored to draw a distinction between what he termed an illegal contract, in the strict sense of the term, and one fraudulent, as it respects creditors. To the former class he applied the maxim, *ex dolo malo non oritur actio*, but the latter he regarded as regulated by the statute of frauds, and not as altogether void, but as binding upon the parties. This view is not supported by any cases which bear upon the point, for those to which reference is made are authorities relating to executed and not executory contracts. But, it seems to me, the defect in the opinion is deeper than the mere absence of decisions which sustain it, because no attempt is made to explain how a contract, which is clearly against the policy of the statute of frauds, as well as against the general spirit of the law, is not, in any sense of the term, an illegal contract. In their essence and in their effects such contracts are as immoral and pernicious as many of

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those which the law has declared to be utterly void. * * * I can see no reason why contracts to defraud creditors should stand on a different footing from the rest of those embraced in the class to which they evidently belong. They are hostile to fair dealing and commercial honesty, and on this account should be subjected to the ban of outlawry. The law says to those who embark in such enterprises, in the language of Chief Justice Wilmot, in *Collins v. Blantern* (2 Wils. 341): “You shall not stipulate for iniquity, for no polluted hand shall touch the pure fountains of justice.”

Appellant has cited but two cases in his favor wherein the courts discuss the question whether there is any difference between an executed and an executory contract. These are *Springer v. Drosch*, 32 Ind. 486; and *Clemens v. Clemens*, 28 Wis. 637.

The decisions in Indiana are inconsistent. The reasoning in the case of *Findley v. Cooley*, is claimed to be in favor of appellant. But the supreme court of that state in the subsequent case of *Welby v. Armstrong*, refer to it only in support of the rule that conveyances to hinder creditors are not absolutely void, but are considered binding between the parties. After stating that in New York this doctrine was confined to executed conveyances, Hanna, J., in delivering the opinion, which was concurred in by all the justices, says: “It remains for us to say whether the distinction taken by the New York cases referred to is correct. It appears to us the decisions named are founded on sound sense and reason, and are in consonance with a line of decisions adopted and followed by this court upon kindred questions. We do not recollect, and have not been referred to, any case in this court where this point arose, and the distinction now taken was urged upon the attention of the court; although, without a just regard to such distinction, loose expressions may have been used which would apparently conflict with the conclusion now arrived at.” (21 Ind. 491.)

After these comments, it is rather strange, to say the least, to find in *Springer v. Drosch*, the statement that this

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question is, indeed, at rest, adverse to the views expressed in the last case cited, and that the rulings in Indiana are uniform upon the subject, “if we except the case of *Welby v. Armstrong* (21 Ind. 489), which, while professing to follow the case of *Findley v. Cooley*, *supra*, announces a doctrine in conflict therewith.”

Justice Ray, in delivering the opinion in *Springer v. Drosch*, seemed to think it necessary to overrule *Welby v. Armstrong*, in order to defend Judge Blackford from the legal assaults made upon his reasoning in *Findley v. Cooley* by the court of New York in *Nellis v. Clark*. Neither Judge Blackford nor his decision required any such defense. It may be admitted that Judge Blackford is the fairest, most careful and able jurist that ever adorned the supreme bench of that state; and, in the judgment of the writer of this opinion, if this question was left to the legal profession of that state it would be so decided. But, like other men, he was not infallible, and, like other equally distinguished jurists, he was at times liable to err, and whatever made be said in regard to the correctness of his views, as expressed in *Findley v. Cooley*, it must be admitted that his decision was based upon the executed, not the executory contract, and that it nowhere appears that his attention was called to the distinction which exists between executed and executory contracts. This fact was recognized by the learned justice who wrote the opinion in *Welby v. Armstrong*, but was either overlooked or entirely ignored in the case of *Springer v. Drosch*. These conflicting opinions have a tendency to destroy the force and effect that might otherwise be given to the decisions in that state.

In this connection it is proper to add that the decisions in California are as conflicting and far more unsatisfactory than in Indiana. *Davis v. Mitchell* (34 Cal. 82), may be considered as favoring appellant, and *Ager v. Duncan* (50 Cal. 327), as favoring respondent; but the questions presented in these cases failed to elicit any discussion by the court, and neither of the opinions are sufficiently considered to entitle them to any special weight upon either side. The reasoning in the case of *Clemens v. Clemens*, *supra*, is

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in favor of the position contended for by appellant. The court indorse the views expressed by Judge Blackford and, after a lengthy review of the authorities, adopt the rule as announced in *Dyer v. Homer* (22 Pick. 253).

Dyer v. Homer, is distinguishable from the case under consideration in this, that the note given in that case “was supported by a sale of property which, between the parties, was valid, and never was questioned by anybody else,” and the court was not called upon to determine “whether it was right then to allow the defendant to show his own turpitude in giving a note, without consideration, for the purposes of fraud and imposition.” Shaw, C. J. (as well as Morton, J.) bases his decision upon the ground that the case is distinguishable from cases where the “notes were made for the purpose of enabling the promisee to hold out a false appearance of contract when there was no real contract, whereas here was a contract good and valid as between the parties.” In this respect the facts in *Dyer v. Homer*, were the same as in *Findley v. Cooley*. Neither of these cases, when properly considered, is, in our opinion, opposed to the position taken by respondent under the facts of this case. But whatever may be said of the opinion in *Dyer v. Homer*, upon which the court in *Clemens v. Clemens*, seemed specially to rely, we find the later decisions in Massachusetts, the facts of which are applicable to this case, announcing the rule in favor of respondent.

The court in *Steinberg v. Bowman*, in declaring that promissory notes given by a debtor to his creditor for twice the amount due, in order to enable the creditor to obtain a larger dividend under a composition deed between the debtor and all his creditors void, say: “The plaintiff, in taking the notes for this purpose, practiced a fraud upon the other creditors. The consideration of the notes was therefore illegal, and the notes were wholly void as between the parties.” (103 Mass. 325.)

Now, let us look for a moment at the facts in the case at bar, as shown by the record before us. The appellant comes into court seeking to enforce a promissory note of sixteen thousand dollars against the estate of T. F. Smith,

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deceased. No consideration whatever was given for the note. Appellant fraudulently colluded with said Smith, in his lifetime, to defraud Smith's creditors and the note was executed for the sole purpose of enabling appellant to hold out a false appearance of a contract, when, in fact, there was no real or valid contract between them. If we should adopt the rule contended for by appellant then the courts of this state would be placed in the singular and degrading attitude of being compelled to lend their aid in enforcing contracts made without consideration, and in not only protecting but rewarding a party who has been guilty of the basest degree of moral turpitude, if not of actual crime, against the people of this state. (1 Comp. L. 2441.) Such a proposition is, it seems to us, an outrage upon the name of justice and of law, a violation of every sense of reason and of right, and subversive of every legal principle that is deserving of sanction by the courts. On the other hand, by adopting the rule contended for by respondent, and which, in our judgment, as stated before, is fully supported by a decided preponderance of the authorities, the courts can never be called upon to legalize a fraud, or enable any man upon an executory contract to realize a profit from his own immoral conduct. The very moment the fraud is clearly proven the court refuses to grant any relief. If the fraud has been consummated it tells the party seeking to set it aside that if he has fallen into the trap which he set for his neighbor, there he must remain and suffer the consequences of his own turpitude. If it requires the action of the court to consummate the fraud, then it tells the plaintiff, your hands, as well as the defendant's are polluted, and you shall not be allowed any protection in your brazen attempt to gain profit by your own iniquitous conduct. Whenever, in this manner, an executory contract is tainted with fraud, the court refuses to enforce it, and it makes no difference whether the fraud is shown by the plaintiff or defendant.

We have, by extended quotations from the decided cases, endeavored to show that in whatever light this case may be considered, whether controlled by the provisions of the statute of this state, the rules of the common law, the rea-

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son, theory or public policy of the law, or the weight of authority, the same result is ascertained. *Ex dolo malo non oritur actio.*

Entertaining these views, it is unnecessary to consider what effect, if any, the act relating to offenses committed by fraudulent persons (1 Comp. L. 2441), would have upon the contract.

3. Appellant claims that the court erred in compelling him to apply the proceeds derived from the sale of one hundred shares of Overman stock, amounting to five thousand two hundred and twenty-two dollars and twenty-five cents, upon the valid notes, and argues that this was in fact allowing defendant to recover back money paid under the alleged fraudulent contract.

Our attention has not been called to any evidence tending to show that Smith ever authorized appellant to appropriate this money toward the discharge of the fraudulent note, or that the appropriation was made with Smith's knowledge or assent. In the absence of any such a showing, we think the law compelled appellant to appropriate the money upon the valid notes.

4. The court did not err in admitting the testimony of the witness Small as to the dates he received and returned the horses described in the bill of sale. This witness testified that he had no way of fixing the dates, except by referring to his book. But his testimony tended to show that the book referred to, and which he was permitted to examine in order to refresh his memory, was a book of original entries made by himself; that the entries were made at the time of the occurrences, and that the dates were correct. Under such a state of facts it cannot be said that his testimony was mere hearsay. We are of opinion that the testimony was clearly admissible. (1 Green on Ev. secs. 436-7; *Bank of Monroe v. Culver*, 2 Hill. 535.)

5. Lastly it is contended that the court erred in taxing costs against appellant.

The record shows that after the jury was impaneled and before the examination of witnesses commenced, the defendant brought into court and tendered to plaintiff ten

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thousand seven hundred and fifty dollars in gold coin in satisfaction of the amount sued for in this action. This was refused by plaintiff upon the ground that no tender had been pleaded in the answer, and the further ground "that plaintiff claims the full amount prayed for in his complaint." The tender was evidently made to cover the amount due on the valid notes, independent of the proceeds of the sale of Overman stock, which the defendant claimed upon the trial was sold without authority. The objection extends only to the question of costs, and does not reach the merits of the case. (*Schroeder v. Gemeinder*, 10 Nev. 367.) The amount tendered was largely in excess of the amount recovered. If the objection that the tender was not pleaded had been the only objection made, it would have been good as against all the costs that plaintiff had incurred up to the time the tender was made in open court; but plaintiff claimed the full amount prayed for in his complaint. The disputed controversy was his right to recover upon the sixteen thousand dollar note. The defendant admitted the validity of the other notes, and tendered the amount due thereon, which was refused.

The record fails to state what costs were allowed, and we are, therefore, unable to determine whether any error occurred in taxing the costs. The plaintiff was only entitled to recover the general costs of the suit incurred prior to the time of the tender. He was not entitled to any costs whatever relating specially to the sixteen thousand dollar note, because upon that note the defendant obtained judgment. The defendant was entitled to recover all costs that accrued after the tender was made and all other costs relating specially to the sixteen thousand dollar note. From the amount of costs allowed to defendant it would seem that no mistake had been made in this respect; but if an error has occurred the court below will, upon proper notice, allow the costs to be retaxed in accordance with the views herein expressed.

In all other respects the judgment of the district court is affirmed.

Argument for Petitioner.

[No. 842½.]

IN THE MATTER OF THE APPLICATION OF SHEPHERD L.
WIXOM FOR THE WRIT OF CERTIORARI.

CERTIORARI—EXPIRATION OF TIME FOR APPEAL.—Petitioner, having been convicted of a felony, and the time for appeal having expired, claims that his right to appeal was lost by means of the arbitrary conduct of the district court in forcing him to go to trial without the assistance of counsel, and asks that a writ of certiorari be issued to review the proceedings had in the district court: *Held*, that the case cannot be reviewed upon its merits as the court had jurisdiction of the case and of the person of petitioner.

IDEM.—The review upon certiorari extends only to the question whether the inferior tribunal has kept within its jurisdiction.

Original application to the supreme court for a writ of certiorari.

The facts are sufficiently stated in the opinion.

T. W. W. Davies, for Petitioner:

I. The office of a writ of certiorari when issued out of the supreme court, to review the proceedings and determination of inferior tribunals, extends to the review of all questions of jurisdiction, power and authority, of the inferior tribunal to do the act complained of and to all questions of regularity in the proceedings, that is, to all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the statute, or by well settled principles of the common law. (*People v. Board of Assessors, &c.*, 39 N. Y. 88; *People v. Saunders*, 5 Hun. Id. 18; *Mullins v. People*, 24 N. Y. 402, 404; *Swift v. City of Poughkeepsie*, 37 Id. 511, 516; *People v. Assessors, &c.*, 4 Id. 154; *People v. Board of Police*, 39 Id. 516, 517, 518; *People v. Supervisors, &c.*, 51 Id. 442; *People v. Smith*, 45 Id. 72; *People v. Hamilton*, 39 Id. 107; *Baldwin v. City of Buffalo*, 35 Id. 380; *People v. Lawrence*, 54 Barb. Id. 589; *People v. Westchester*, 8 Abb. Pr. N. S. 277; *Hopkins v. Fogler*, 60 Me. 266; *State v. Dowling*, 50 Mo. 134. See also the earlier N. Y. cases, 20 Johns. 80; 6 Wend. 566; 10 Id. 421; 15 Id. 452; 2 Id. 395; 5 Id. 98; 8 Cow. 13, 16; 7 Id. 108, 136, 137; 6 Id. 570; 2

Argument for the State.

Hill 9, 11; Id. 398; 6 How. 25; 32 Barb. 131; 43 Id. 232; 3 Seld. 152; 3 Kern 223; 23 N. Y. 192, 222.

II. When an appeal is allowable, yet, if the opportunity of taking it, or the means of prosecuting it, be lost by the neglect of a legal officer, the contrivance of the opposite party, or improper conduct in the inferior court, a certiorari will be granted without reference to the merits of the cause. (*Allen v. Prim*, 2 Swan 337; *Baker v. Halstead*, Busb. L. 41; *Perkins v. Hadley*, 4 Hayw. 143; *Collins v. Nall*, 3 Dev. L. 224; *Kearney v. Jackson*, 1 Yerg. 294; *Mera v. Scales*, 2 Hawks, 364; *Garret v. Perryman*, 2 Overt. 108; *Newton v. Chrisman*, 9 Texas 113; *Reade v. Hamlin*, Phill. Eq. 128; *McConnell v. Caldwell*, 6 Jones, L. 469; *Britt v. Patterson*, 9 Ired. L. 197; *Sharp v. McElwee*, 8 Jones L. 115; *Napier v. Pierson*, 7 Yerg. 300; *Hale v. Landrum*, 2 Humph. 32; *Smith v. White*, 5 Humph. 46; *O'Sullivan v. Larry*, 2 Head. 54; *Wallsworth v. Kapp*, 31 Texas, 359; *Skinner v. Maxwell*, 67 N. C. 257; *Smith v. Parker*, 25 Ark. 518; *Mason v. Hammon*, 7 Col. 132; *McLeran v. Melvin*, 3 Jones Eq. 195; *Murray v. Shannon*, 4 Dev. & B. 276; *Trice v. Yarborough*, 4 Ired. 11; 5 Heisk, 171, 250; 7 Id. 303.

III. Certiorari should be exercised in view of justice and equity, and especially to correct palpable injustice. (*People v. Andrews*, 52 N. Y. 445; *People v. Utica*, 65 Barb. 1; *Keys v. Marin Co.*, 42 Cal. 252; *People v. Hill*, 65 Barb. 435; *Fonda v. Canal Com.*, 1 Wend. 288; *Brooklyn v. Patchen*, 8 Wend. 47; *Duggen v. McGruder*, Walker (Miss.), 112.)

John R. Kittrell, Attorney-General, for the State.

I. The writ does not lie in this case. The only cases in which the writ of certiorari will lie are those in which an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy. (Civil Pr. Act, sec. 436; *Bennett v. Wallace*, 43 Cal. 25; *C.P.R.R. v. Placer Co.* 43 Cal. 365.)

II. The court has only appellate jurisdiction, and is only authorized to issue the writ of certiorari in aid of such juris-

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diction. (Const. Art. VI., sec. 4; *Milliken v. Huber*, 21 Cal. 166; 1 Cal. 85; *People v. Shear*, 7 Ind. 139.)

By the Court, BEATTY, J.:

In January, 1874, the petitioner was convicted of a felony in the district court for Lander county, and is now confined in the state prison under sentence pronounced upon that conviction.

The time within which he might have appealed from the judgment having elapsed, he presents this petition for a writ of certiorari, commanding the district court to certify its proceedings on the trial of the indictment.

It appears from the petition and accompanying affidavit that when the petitioner was arraigned in the district court he stated that he was too poor to employ counsel; that the judge requested every member of the bar present in court to act as his counsel, but that they each and all declined to do so, and that a gentleman, not a licensed attorney, was then appointed and induced by the court to aid the prisoner in his defense. A plea of not guilty was thereupon entered and the case set down for trial. On the day appointed for the trial, the petitioner filed an affidavit, and moved for a continuance on the ground of absence of material witnesses, and this motion being overruled, objected to any further proceedings in the case until he could procure the assistance of professional counsel. The court, however, ordered the trial to proceed, with the result above stated.

It is alleged that the district court grossly abused its discretion, and did not regularly pursue its authority in overruling the motion for a continuance, and requiring the trial to proceed without providing the petitioner or giving him a further opportunity to provide himself with sufficient counsel.

The question to be decided is whether these are sufficient grounds to authorize the issuance of the writ of certiorari. It is objected in the first place that the petitioner might have appealed from the judgment, and that the fact that the time within which he might have appealed has elapsed does not make this a case in which there is no appeal. But to

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this the petitioner replies that although he had the right to appeal, the right was rendered nugatory, and the opportunity lost by means of the erroneous and arbitrary conduct of the district court in forcing him to go to trial without the assistance of counsel learned in the law. He says that having been convicted and imprisoned in the state prison, without liberty to act for himself, and without counsel to act for him, he was practically debarred of the right of appeal by the very error which he seeks to have reviewed; and he cites a number of cases in support of the proposition that when a party has been deprived of the opportunity of appealing by the contrivance of the opposite party, or the misconduct of the inferior tribunal, certiorari will lie notwithstanding the rule which denies that remedy in cases where there is an appeal. The principle upon which these decisions are based is certainly an equitable and just one, and if I thought that in this case the district court had exceeded its jurisdiction, I should be inclined to follow them. But there is a more formidable objection to issuing the writ upon this petition. It has been frequently decided in this court that the review upon certiorari extends only to the question whether the inferior tribunal has kept within its jurisdiction, and that mere errors not involving any excess of authority will not be inquired into. (2 Nev. 313; 5 Id. 317; 6 Id. 100; 7 Id. 372; 8 Id. 359; 9 Id. 382; 11 Id. 213.) To the same effect are numerous decisions of the supreme court of California, based upon a statute identical with our own. But, notwithstanding this uniform current of decision in this state and in California, we are asked by counsel for petitioner to review the question and to adopt the more liberal rule which he claims has the sanction of the latest and best considered cases in several of the states, and particularly in the state of New York. He contends, upon the authority of those cases, that on the return of the writ of certiorari, we may annul the proceedings of the inferior tribunal for any error it may have committed prejudicial to the rights of the petitioner, whether such error involves an excess of authority or not. There are undoubtedly cases which go to this extent, but counsel has overlooked the fact,

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or the significance of the fact, that the functions of the writ of certiorari in this state are clearly defined by the statute. There was for a long time, and perhaps still is, much diversity of opinion among the judges and courts of other states as to the office of a common law certiorari, some allowing it a very extensive, and others confining it to a very restricted, operation. Which was the better opinion, however, is no longer a question of practical importance in this state, since our legislature has seen fit to lay down a precise rule on the subject. A comparison of sections 1497 and 1503 of the Compiled Laws with the language used by Judge Bronson in deciding the case of *People ex rel. Seward v. The Judges of the County of Dutchess* (23 Wend. 362), will make it manifest what was the view the legislature intended to adopt. In that case, Judge Bronson said: "Our supervisory power over inferior tribunals by means of this writ, except in cases where special provisions have been made by the legislature, only extends to questions touching the jurisdiction of the subordinate tribunal and the regularity of its proceedings. If they neither exceed their powers nor depart from the forms prescribed to them by law, their decision upon the merits of any controversy before them is final and conclusive."

The statute says: "The writ shall be granted in all cases when an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal," etc. (Sec. 1497.)

"The review upon this writ shall not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer." (Sec. 1503.)

This being the rule by which we are bound, it is plain that we have no power to reverse or annul the judgment of the district court in the proceeding which we are asked to review unless that court either exceeded its powers or (which is in reality the same thing) departed from the forms prescribed to it by law, and it is equally plain, upon the petitioner's showing, that the court did neither. The court had jurisdiction of the case and of the petitioner, and its judg-

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ment is in conformity to law. In overruling the motion for a continuance, and compelling the petitioner to go to trial without professional counsel, the district judge may have erred, and may have abused his discretion, but he departed from no express provision of the law. His action may have afforded good grounds for granting the defendant a new trial, or for reversing the judgment on appeal, but there was no excess of jurisdiction. If there was any law which expressly required the district judges to assign counsel to the defendant in a criminal action at any particular stage of the proceedings, a failure to do so would be a departure from the forms prescribed to them by law, and would be ground of reversal on certiorari in cases where the remedy is available. But in this state there is no such law. In many of the states, perhaps in most of them, the judges of the courts of record are required by statute to assign counsel to poor defendants, and in all of the states it is the common, perhaps the universal practice to do so. Certainly it is a humane and commendable practice to do so, and a statute (Laws of 1875, 142) passed since the trial of this petitioner, has made provision for compensation of attorneys appointed to defend in such cases. Probably since this statute, if not before, a failure to assign professional counsel for a poor defendant would be deemed a fatal error on appeal; but the question is not necessarily involved in this case and need not be decided. It is sufficient to say that, if in this case the court erred, it did not exceed its jurisdiction. The petition should therefore be dismissed. It is so ordered.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.

JULY TERM, 1877.

[No. 815.]

JOHN P. FOULKS, RESPONDENT, *v.* B. F. RHODES,
APPELLANT.

COUNTER-CLAIM—COPARTNERSHIP ACCOUNT—PLEADINGS.—As a counter-claim to an action upon a promissory note and upon an account for goods sold, etc, the defendant claimed damages for an alleged breach of contract upon the part of plaintiff, and alleged that plaintiff and defendant were copartners in the saw-mill business, and that it was agreed to put in as a part of defendant's contribution to the capital stock of the partnership, the notes and accounts sued upon. To this plea plaintiff demurred, upon the ground that defendant could not plead an unsettled partnership account as a counter-claim to a demand which is independent of the partnership: *Held*, that the demurrer was not good, because if the averment in the answer was true, the demands sued upon were not independent of the partnership but were a part of the partnership affairs.

PAROL EVIDENCE—WHEN ADMISSIBLE.—Parol evidence is admissible to show an agreement between the parties that the note executed by defendant to plaintiff might, upon the consideration of the formation of a copartnership, be paid by crediting defendant with the amount of the note in the partnership accounts. This would not be a variation of the written agreement, but a satisfaction of it.

COUNTER-CLAIMS—ACTIONS UPON CONTRACTS.—In an action arising upon contract, any other cause of action arising also upon contract and existing at the time of the commencement of the action is a good counter-claim.

Argument for Appellant.

IDEM—COPARTNERSHIP ACCOUNTS—INSOLVENCY OF PLAINTIFF.—The defendant in an action brought against him to recover the amount due upon a promissory note alleged that plaintiff and himself were copartners; that the partnership accounts were unsettled; that upon a settlement the plaintiff would be found largely indebted to defendant; that plaintiff is insolvent, and that defendant will be irreparably damaged by being compelled to pay plaintiff the amount of the note: *Held*, that these averments if true, afford good grounds for invoking the equitable powers of the court to settle the partnership accounts before trying the legal issues involved in the case.

IDEM.—Where the defendant and plaintiff entered into a written agreement to construct a flume, and the defendant claimed damages for a breach of that agreement: *Held*, that the damages might be ascertained without settling the accounts of the partnership existing between plaintiff and defendant in the saw-mill business.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

Thomas E. Haydon, for Appellant:

I. The general demurer to defendant's amended answer should be overruled if the whole answer discloses any one valid defense. (*People v. Merrill*, 26 Cal. 361; 4 Cal. 327, 428; 10 Cal. 233; 26 Cal. 294.)

II. Defendant's plea of payment is sufficient. (2 Van Sant. Pl. 551.)

III. The allegations in the answer as to formation of partnership is sufficient. (*Gage v. Angell*, 8 How. 335.)

IV. The allegations as to breach of contract were abundantly sufficient. (*Prescott & Booth v. Wells, Fargo & Co.*, 3 Nev. 88 to 92.)

V. All the defenses alleged in the answer are strictly in the nature of actions *ex contractu*. (*Lignot v. Redding*, 4 E. D. Smith, 285; *Schubart v. Harteau*, 34 Barb. 447.)

VI. The allegation of plaintiff's insolvency is sufficiently alleged in defendant's answer. (*Bennett v. Whiteside*, 13 Cal. 151-158; Bump's Law and Practice of Bankruptcy, 448-9.)

VII. Section 47 of the civil practice act in defining what is a counter-claim is conclusive of the validity of defendant's defenses in this action. (1 C. L. 1110.) See construction of same section in California. (*Stoddard v. Tread-*

Argument for Respondent.

well, 26 Cal. 309.) To the same effect: *Patterson v. Richards*, 22 Barb. 146; *Gleason v. Moen*, 2 Duer. 639; *Lignot v. Redding*, 4 E. D. Smith, 162.

VIII. A partnership can only exist by force of a contract, express or implied, and an action to recover a balance due from one partner to another, is an action on contract. (*Gage v. Angell*, 8 How. 335.) Cited as authority and approved in: 11 Abb. Pr. 213; 13 How. Pr. 242; 19 Abb. Pr. 196; 25 N. Y. (11 Smith) 628; 28 N. Y. (1 Tiff.) 462; 2d vol. 3d ed. Whit. Prac. 161, par. 7 and 8. A claim for unliquidated damages for breach of contract has been held a valid counter-claim in an independent action *ex contractu*. (*Lignot v. Redding*, 4 E. D. Smith, 285; *Schubart v. Harteau*, 34 Barb. 447.)

IX. If the court should conclude that a valid counter-claim is disclosed, but not plead correctly, then the court would allow defendant to so amend. (*Gerren v. Huhn & Hunt S. M. Co.*, 10 Nev. 139-41.)

X. The demurrer should have pointed out the defects relied on. (*Treadway v. Wilder*, 8 Nev. 91.)

Boardman & Varian, for Respondent:

I. The proposition that one partner cannot sue at law his copartner, pending the copartnership, is well settled. (Pars. on Part., 278-8 *et seq.*; *Russell v. Ford*, 2 Cal. 86; *Stone v. Fouse*, 3 Cal. 292; *Nugent v. Stock*, 4 Cal. 318; *Pio Pico v. Cuyas*, 47 Cal. 175; *Ross v. Cornell*, 45 Cal. 134.)

The claims here set up cannot stand as defenses. (Pars., *supra*, 282; *Ives v. Miller*, 19 Barb. 196; *Haskell v. Moore*, 29 Cal. 443.) It is true that an action for damages may be sustained upon a breach of an express stipulation between partners, but not when such breach or stipulation involves the whole partnership business and accounts. (Pars. on Part. 288.)

In this case, both breach and stipulation involve partnership business, and the matters arising out of the breach of the stipulation could not be adjusted without a consideration of the entire partnership business, which now remains

Argument for Appellant in reply.

unsettled. The case of *Stone v. Fouse, supra*, seems to be on all fours with the case at bar. (3 Cal. 292.)

II. So far as the agreement to accept payment of the note out of partnership proceeds is concerned, we say that it is in effect adding new parties to the instrument, and also varying the written obligation by parol. (Pars. on Part., 286; Pars. Notes and Bills, ed. 1869, 501-06 *et seq.*)

III. The allegations in the answer are not sufficient to warrant equitable interference by the court. (1 Story's Eq., sec. 673; Pars. Part., 474 *et seq.*)

IV. The sufficiency of a counter-claim is tested by the same rule as a complaint. The defenses in this case being equitable, must be pleaded as fully as if seeking affirmative relief in chancery by bill. (*Bruck v. Tucker*, 42 Cal. 352.)

Thomas E. Haydon, in reply:

I. The case of *Ives v. Miller* (19 Barb. 196), cited by respondent is really overruled by weight of authority. *Gage v. Angell* (8 How. 335), is cited as authority for the proposition that the code, (sec. 150, which is substantially our sec. 47 of Pr. Act) secures to defendant the right to interpose as many defenses as he has, whether legal, equitable, or both. (25 N. Y. 128; *Dobson v. Pierce*, 2 Kern. 156; *Blair v. Claxton*, 18 N. Y. 529; *Bank of Toronto v. Hunter*, 20 How. 292; *Phillips v. Gorham*, 17 N. Y. 270.) *Gage v. Angell*, is also cited as authority for the proposition that an alleged balance that will be found due on settlement of partnership accounts may be set off against an action arising out of another contract: in 13 How. 249; 11 Abb. 213; 19 Abb. 196; 28 N. Y. (1 Tiff.) 412-462. But *Ives v. Miller* (19 Barb. 202), decides that if the plaintiff on final settlement will be indebted to the defendant, and is insolvent, the latter will be relieved by a cross-action or by a proper answer on the ground of such insolvency. The answer of defendant here alleges the insolvency of plaintiff, and shows defendant exactly within the rule of *Ives v. Miller, supra*. This shows the pertinency of the allegation of insolvency of plaintiff, and brings the counter-claim of defendant within all equitable rules on the subject. (*Hobbs v. Duff*, 23 Cal. 625-29.)

Opinion of the Court—Beatty, J.

By the Court, BEATTY, J.:

This is a suit upon a promissory note of the defendant, dated in December, 1873, for two hundred and ninety dollars, payable to the plaintiff one day after date, and upon an account for goods sold and money advanced by the plaintiff to the defendant prior to the commencement of the action, which was on July 31, 1875. The amount claimed on the account is nine hundred and fifty-eight dollars and seventy-five cents. The defendant admits an original indebtedness of nearly the amount claimed, but pleads payment and counter-claims. The plaintiff demurred to the answer on the general ground that the facts stated therein did not constitute any defense to the action, and the demurrer, as to the counter-claims, was sustained. The defendant declining to amend, plaintiff had judgment and the defendant appeals. The only question to be decided is whether the court erred in sustaining the demurrer. The terms of the order in question are not very definite, and there is a difference of opinion between counsel as to what portions of the answer were held to be insufficient. It will not be necessary, however, to give any precise construction to the order, as we are of opinion it is erroneous in sustaining the demurrer to the extent to which respondent admits it was sustained.

Among other matters, the defendant alleges that on the twenty-seventh of May, 1874, he and the plaintiff entered into a copartnership in the business of operating a saw-mill near Verdi, on the Truckee river, and that a part of their agreement was that the plaintiff was to "furnish supplies of goods, wares and merchandise from the store of plaintiff to defendant, and for such partnership business, at said mill, and take his pay for such goods, wares and merchandise out of the sales of lumber and other produce of said mill, and also to take the amount of principal and interest of defendant's note, then due and owing from defendant to plaintiff, out of the lumber and produce of said mill, in kind, as plaintiff needed the same, or out of the proceeds of sales of such lumber and produce of said mill." It is al-

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leged that under this agreement they entered upon and continued to carry on said copartnership operations from May 27, 1874, to January 5, 1875, and that out of said partnership operations defendant paid to plaintiff, over and above his share the sum of one thousand dollars on the note and account sued on.

For a further and separate defense, it is alleged that the parties entered into the partnership above mentioned and that, after paying all debts and expenses, plaintiff had received over and above his share of the proceeds of the partnership business one thousand dollars of the share of the defendant; "that the plaintiff is utterly insolvent and very largely indebted over and above the value of all and any property owned by him that is not exempt from execution, and if defendant were compelled to pay the amount of plaintiff's demands against the defendant, he (defendant) would be unable to collect his demands due him by reason of said partnership transactions aforesaid, and would be irreparably injured, and defendant therefore prays that the indebtedness of plaintiff to this defendant, on account of such partnership transactions, be ascertained and be allowed to this defendant as an offset and counter-claim to plaintiff's demands against defendant that shall be found due in this suit to plaintiff from defendant."

For a further and separate defense to the action, the defendant alleges that on the twenty-seventh of May, A. D. 1874, he was the owner of the saw-mill above mentioned and also of certain water rights appurtenant thereto, the whole of the value of five thousand dollars; that, in consideration of the plaintiff's entering into the written agreement hereinafter set forth, he on that day sold and conveyed to the plaintiff an undivided half of said property, and that the plaintiff thereafter occupied and possessed it in common with him. The contract executed by plaintiff in consideration of this sale was as follows:

"This agreement, made this twenty-seventh day of May, in the year of our Lord 1874, between J. P. Foulks, of Washoe, State of Nevada, party of the first part, and B. F. Rhodes, of the county and state aforesaid, party of the sec-

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ond part: The said J. P. Foulks, party of the first part, for and in consideration of quitclaim deed from the said B. F. Rhodes of the undivided half of the following described property, * * * agrees to construct or build a substantial V flume of planks, the sides to be one and one-half inches thick, one side to be twenty inches wide and the other twenty-one and one-half inches; said flume to be built from the said Proctor mill to the road running on the north side of William Merrill's field, near the Truckee river, Washoe county, Nevada; said flume to be completed on or before September 25, 1874. The undivided one-half of said flume, also one-half of the water running through said flume, shall be the property of the said B. F. Rhodes; the said J. B. Foulks to secure the right of way for a flume from the Truckee river to the depot near Verdi. The above property shall be the company property of the said J. P. Foulks and B. F. Rhodes.

J. P. FOULKS.

“B. F. RHODES.”

The breach of this contract by the plaintiff is alleged and damages claimed therefor in an amount more than equal to the demands sued on.

Whether the order sustaining the demurrer applies to the first of these defenses is a point in dispute, but it is conceded that it applies to the last two. If it did apply to the first, it was in so far erroneous, for the reason that the allegations of that count amount substantially to this: That the plaintiff agreed to put in, as a part of his contribution to the capital stock of the partnership about to be formed, the note of defendant, then due and payable, and the supplies which are the subject of the account sued on. If the facts alleged are true, as the demurrer confesses them to be, it does not lie in the mouth of the plaintiff to object that the defendant cannot be allowed to plead an unsettled partnership account as a counter-claim to a demand which is independent of the partnership and the subject of an action at law between the partners. The answer to this proposition is obvious. The demands sued on are not independent of the partnership. By the express agreement of the plaintiff they are a part of the partnership affairs, and cannot be settled except through a settlement of the partnership affairs. The objection of the respondent, that the agree-

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ment that the note should be paid out of the avails of the partnership business was invalid as an attempt to vary by parol the terms of a written instrument, is not sustained by the authorities referred to. They all relate to parol agreements which are contemporaneous with the execution of the written agreement, and which are intended to change its effect. Here was nothing of the kind. The note in question was then due and payable, and on a new consideration, *i. e.*, the formation of the partnership, plaintiff agreed that it might be paid in a particular way, by crediting him with so much in the partnership accounts. This was the effect, if not the terms, of the parol agreement. It was not a variation of the written agreement, but a satisfaction of it.

We will, however, consider the demurrer more particularly with reference to the second and third defenses above stated.

This is an action arising upon contract, and therefore any other cause of action arising also upon contract, and existing at the commencement of the action, is a good counter-claim. (Comp. L., 1,110.) If the second and third defenses set forth causes of action existing at the commencement of the action, it cannot of course be denied that they are causes of action arising upon contract. The respondent contends that they do not show causes of action existing at the commencement of this action, because they embrace the partnership affairs of the plaintiff and defendant, and it does not appear that there has ever been any settlement of the partnership accounts, or even a dissolution of the co-partnership, or any reason for a court of equity to decree a dissolution. It is true the answer does not show any settlement of the partnership accounts, and there is no express allegation that the partnership has been dissolved, though the allegation that the partnership business was carried on from May 27, 1874, to January 5, 1875, might warrant the inference that it was dissolved at the latter date. But, however this may be, the authorities are conflicting upon the question whether a balance, which it is claimed will be found due on the settlement of a partnership account, can be pleaded by one partner as a counter-claim to an indi-

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vidual demand of his copartner, even where the partnership has been dissolved before the action was commenced. *Gage v. Angell* (8 How. Pr., 325), affirms the proposition, and *Ives v. Miller* (19 Barb. 197), denies it. The reasoning of the former decision is more satisfactory and more in consonance with the spirit of the code than that of the latter one; but it is unnecessary to decide in this case which lays down the law correctly. Taking the latter for authority, it is conclusive against the respondent. The court say (p. 202): "There are cases of natural equity, irrespective of any statute, where the court will interfere. If the plaintiff, on final settlement, will be indebted to the defendant, and is insolvent, and defendant, therefore, in danger of losing what may be so found due to him, the latter would be entitled to relief by a cross-action, if not by a proper answer in this, on the ground of his peculiar equity."

The expressions here quoted were perhaps *obiter* in that case, but they are well warranted by the decisions referred to, and they express our opinion on the question under consideration. Admitting that the claim of the defendant arising out of the unsettled partnership accounts could not be properly pleaded as a set-off to the claims of the plaintiff, there are facts stated which would entitle defendant to maintain a cross-action. He shows that the plaintiff is insolvent and that he will never be able to collect what will be due him on settlement of the partnership accounts; in short, that he will be irreparably damaged by being compelled to pay plaintiff's demands. It makes no difference, therefore, whether the partnership was dissolved or not before the commencement of this action. The insolvency of the plaintiff, and the fact that he will be found indebted, which are plainly alleged, afford good grounds for invoking the equitable powers of the court to settle the partnership accounts before trying the legal issues involved in the case.

The third defense does not involve the partnership affairs. It is nowhere alleged that the plaintiff and defendant were partners in any business except the running of the saw-mill. The plaintiff, it is true, acquired his half interest in the saw-mill in consideration of executing the written agree-

Points decided.

ment, the breach of which is the subject of the third defense; but the agreement to operate the mill as partners was entirely distinct from the written agreement, and the latter is just as independent of the former as it would have been if it had been a promissory note for two thousand five hundred dollars, instead of an agreement to build a V flume. The agreement to build the flume and convey one-half of it to the defendant when completed was the purchase-price of a half interest in the mill, and the plaintiff is liable to the defendant for a breach of that agreement, just as he would have been liable on his promissory note. It may be that the last clause of the written agreement would be construed as a stipulation that the parties would operate the flume as partners; but if so, it was a stipulation which could only take effect on the completion of the flume, and the allegation is that the flume never was completed. The damages which the defendant has sustained by reason of the failure of the plaintiff to fulfill his agreement to build the flume may not only be ascertained without settling the accounts of the saw-mill business, but could not properly be brought into those accounts. (Par. on Part. 276; Collyer on Part., secs. 269, 270, 271.)

The judgment of the district court is reversed and the case remanded for further proceedings, in accordance with the views herein expressed.

[No. 810.]

MILES QUILLEN, RESPONDENT, v. G. W. ARNOLD AND
LOUIS SULTAN, APPELLANTS.

AMENDMENTS TO PLEADINGS—CHANGE OF PARTIES—RELEASE OF SURETIES.—

Where an attachment was issued in a suit commenced by M. Q. and J. D., administrator of the estate of E. D., deceased, against S., and the defendant gave an undertaking to release the attachment, and thereafter the plaintiffs, without the knowledge of the sureties, were allowed to discontinue the suit against J. D., and to continue the suit as M. Q., surviving partner of the late firm of Q. & D.: *Held*, that under the averments in the pleadings as set forth in the opinion of the court, the parties and the cause of action were so changed by the amendments as to release the sureties from all liability on their undertaking. (HAWLEY, C. J., dissenting.)

Argument for Appellant.

SURVIVING PARTNER—RIGHT OF ACTION.—A surviving partner is entitled to sue in his representative capacity for the amount due the partnership, and in his own name for the amount due to himself individually. The respective demands may be united in the same action, but should be separately stated.

LIABILITY OF SURETIES.—The sureties upon an undertaking for the release of an attachment are only bound to the extent of their obligation; they have the right to stand upon the very terms of their contract, and if it has been changed without their knowledge or consent, they are released from all liability.

AMENDMENT OF PLEADINGS—RIGHTS OF THIRD PARTIES.—Courts have the power, under the provisions of section 68 of the civil practice act, as between the parties to a suit, in furtherance of justice, to amend the pleadings by adding to, or striking out, the names of parties plaintiff or defendant; but this power cannot be exercised so as to change the rights and liabilities of third parties.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The facts are stated in the opinion.

Robert M. Clarke, for Appellant:

I. No judgment could have been recovered upon the original complaint. Neither of the parties plaintiff could maintain the action, nor could they maintain it jointly.

As to that part of the demand, if any, which arose before the death of Edward Donahue, it must be recovered by Quillen as surviving partner for the benefit of the copartnership. (Prob. Act, sec. 200; 1 C. L. 680.)

As to that part which arose after Edward Donahue's death, the estate of Donahue had no interest in it. (*Tompkins v. Weeks*, 26 Cal. 50.) No such amendment as was made in this case is legally admissible. (*Little v. Virginia & Gold Hill W. Co.*, 9 Nev. 317.) The case after amendment was substantially and materially different from the case before amendment, and by the amendment a recovery was made certain where before none was possible.

II. The amendment operated to discharge the sureties from liability. (Drake on Attach., sec. 325, 325a; *Harris v. Taylor*, 3 Sneed. 536; *Willis v. Crooker*, 1 Pick. 204; *Fairfield v. Baldwin*, 12 Pick. 388; *Andre v. Fitzhugh*, 18 Mich. 93; *Moulton v. Chapin*, 28 Me. 505; *Fullerton v. Campbell*, 25 Penn. St. 345.)

Argument for Respondent.

Geo. S. Sawyer, also for Appellant:

I. Sureties are bound only by the strict letter of their contract, and this must be construed *strictissime juris* in favor of the sureties, and their liability cannot be changed without their consent either by agreement between the principals or by operation of law. (2 Pars. on Con. 15, sec. 5 *et seq.*; Chitty on Con. 529 *et seq.*; *Miller v. Stewart*, 9 Wheaton, 680-920; 6 U. S. Sup. Ct. Rep. 234 *et seq.*; *Tarpey v. Shillenberger et al.*, 10 Cal. 390; *People v. Buster*, 11 Cal. 215; *Bragg v. Shain*, 49 Cal. 131; *Mitchum v. Stanton, et al.*, 49 Cal. 302; *McDonald v. Fett et al.*, 49 Cal. 354; 2 Amer. L. Cases, 374 393; *Walsh v. Bailie*, 10 John. 180; *Bean v. Parker et al.*, 17 Mass. 591; *Wright v. Johnson*, 8 Wend. 512; 2 Tilling. & Shear. Pr. 1060; *Potter v. Baker et al.*, 4 Paige. Ch. 290; *Shaw v. Lawrence*, 14 How. Pr. 94.)

II. A complaint cannot be amended so as to change the parties or change the cause of action either by stipulation of parties or by order of court. (Tillinghast & Shearman's Pr. 1046; 1 Van Sanvoort's Plead. 806; *Davis v. Mayor of N. Y.*, 14 N. Y. 506; *Little v. G. H. W. Co.*, 9 Nev. 317; *Tormey v. Pierce*, 49 Cal. 306.) A plaintiff cannot be created by law where none exists in fact in the action. (4 Nev. 42.)

That there was an entry change of parties plaintiff in which the bond under consideration was given is admitted through the whole course of the proceedings in the case. Else, why should they have sought to. A discontinuance *vacates* all provisional remedies. (See 2 Tillinghast & Shearman's Pr. 335, and cases there cited. A change of capacity is the same as a change of persons. (1 Chitty on Plead. 1419; *Merritt v. Seaman*, 2 Selden, 168 and cases cited in opinion; *Wright, receiver, v. Joy*, 11 How. 36; *Worden et al., adm'r v. Worthington, adm'r*, 2 Barb. 368; *Ogdenburg Bank v. Van Rensselaer*, 6 Hill. 240; *Holmes v. D'Camp*, 1 John. 33; *Demott v. Field*, 7 Cow. 58.)

Ellis & King, for Respondent:

The action did not abate, and the property attached would have still been held to secure any judgment, and the under-

Argument for Respondent.

taking sued upon, stands exactly in place of the property discharged, and is liable where it would have been liable. The amendment desired by plaintiff having been made by consent, does not dissolve or affect the attachment or its lien. If the undertaking in question could be sued upon in the case at bar, it was certainly competent and admissible testimony, together with the judgment-roll in the action in which the undertaking was given, as tending to prove plaintiff's case.

Bishop & Sabin and A. B. & W. J. O'Dougherty, also for Respondent:

I. If the party giving the bond fails to recover judgment, or the same is forfeited by the failure of the party giving the same, to comply with all of its conditions, the liability of the sureties attach at once, and the party for whose protection the bond was given may sue at once. (*Drake on Attach.*, secs. 155-166; *Jones v. Childs*, 8 Nev. 121; *Webb v. Pond*, 19 Wend. 423; *Chase, Adm'r, v. Hinman*, 8 Id. 455; *Rockfeller v. Donnelly*, 8 Cow. 639; *Gilbert v. Wiman*, 1 Com. 550; *Ball v. Gardner*, 21 Wend. 270.)

In this case the plaintiff was one of the original obligees in the bond, and he, succeeding to the interest of all, can sue in his own name to recover the penalty. (*Summers v. Farish et al.*, 10 Cal. 347; *Brader v. Purkett*, 13 Cal. 588; *Lally v. Wise*, 28 Cal. 539.)

II. The bond given to release property attached, stands in lieu of the property that is released, and therefore the defendant in the original suit being liable for judgment, his bondsman having released the property that was held by attachment, the bondsman became liable according to the intent and spirit of the bond, and must pay this judgment. (*Heyneman v. Eder et al.*, 17 Cal. 434.)

III. The bond being given to secure the payment of any judgment to be rendered in favor of plaintiff, the real party in interest may sue, etc., in his own name. (*Curia v. Packard*, 29 Cal. 199; *Prader v. Purkett*, 13 Id. 589; *Taaffe v. Rosenthal*, 7 Id. 518; *Baker v. Bartol*, 7 Id. 553; *McMillan v. Dana*, 18 Id. 339.)

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By the Court, BEATTY, J.:

This is a suit upon an undertaking executed by the defendants as sureties in order to procure the discharge of an attachment which had been levied on the goods of John A. Steele, the defendant, in an action entitled as follows: “*Miles Quillen and John Donahue, Administrator of the Estate of Edward Donahue, deceased, plaintiffs, v. John A. Steele, defendant.*”

The complaint alleges the pendency of the former action, the levy of the attachment on the goods of Steele, the execution of the undertaking by defendants, the discharge of the attachment in consequence thereof, the recovery of judgment against Steele, the return of execution thereon unsatisfied, demand on the sureties, and their refusal to pay, etc.

The defendants admit the execution of the undertaking; but deny the breach alleged. Their defense is that the parties and the cause of action in the former suit were changed without their consent, and that no judgment was, in fact, ever recovered upon the cause of action stated in the complaint upon which the attachment issued.

The plaintiff having recovered a judgment in the district court, the defendants moved for a new trial upon the ground, among others, that the decision of the court was not sustained by the evidence, in this: “That the evidence shows and proves that there is no judgment on record or otherwise in the action in which the bond sued upon was given.” The motion for a new trial was overruled, and the appeal is from that order as well as from the judgment. The question is thus presented for our consideration, whether there was such a change of the parties and of the cause of action in the suit against Steele as to discharge these defendants from liability as sureties on the undertaking given to release his goods from attachment. To determine this question it will be necessary to compare the original complaint, which was on file at the date of the execution of the undertaking, with the amended complaint upon which the judgment was rendered. The first was as follows: “Miles Quillen and

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John Donahue, administrator of the estate of Edward Donahue, deceased, the plaintiffs in the above entitled action, complaining of John A. Steele, the defendant in said action, allege: First. That the said plaintiff, John Donahue, is administrator of the estate of Edward Donahue, deceased, late of said Lincoln county, duly appointed, qualified and acting as such administrator; that prior to the death of said Edward Donahue, the said Miles Quillen and Edward Donahue were partners in business at Pioche, in said county, and doing business under the firm name and style of Donahue & Quillen; that since the death of said Edward Donahue, the said plaintiff, Miles Quillen, and the said plaintiff, John Donahue, as such administrator, have and do now continue and carry on the business heretofore carried on by said firm of Donahue & Quillen under said firm name and style at Pioche aforesaid; that between the fifteenth day of August, A.D. 1871, and the third day of December, A.D. 1874, the said defendant became and was indebted to these plaintiffs in the sum of one thousand seven hundred and eighty-three dollars and forty cents, gold coin, and on an account for goods, wares and merchandise, consisting * * * and for money loaned and advanced by plaintiffs to defendant at his special instance and request," etc.

This complaint was filed December 10, 1874, and the following day the defendants herein executed their undertaking, the material portion of which is as follows: "Now, therefore, we, the undersigned, residents, etc., in consideration of the release from attachment of all the property attached, and the discharge of said attachment, do hereby jointly and severally undertake in the said sum of two thousand six hundred and ten dollars and eighty cents, gold coin, and promise that in case the said plaintiffs recover judgment in the said action, the said defendant will, on demand, pay to the said plaintiffs, not exceeding the said sum of two thousand six hundred and ten dollars and eighty cents."

Afterwards, on March 17, 1875, the following stipulation was entered into by the parties to the action, without the knowledge or consent of the sureties: "It is hereby stipu-

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lated that the plaintiffs in the above-entitled action have to and including Thursday, the twenty-seventh day of March, A.D. 1875, to file an amended complaint in the above-entitled action discontinuing as to John L. Donahue, administrator, etc., and amending in such other respects as the plaintiff may see fit."

In pursuance of this stipulation, a new complaint was filed as follows: "Miles Quillen, surviving partner of the late firm of *Quillen & Donahue*, plaintiffs, v. *John A. Steele*, defendant.

"And now comes the plaintiff above named, by leave of court first had and obtained, and files this amended complaint and discontinues as to the said John L. Donahue, administrator, etc., heretofore joined in this action, and alleges:

"That, on the tenth day of February, A. D. 1873, and for more than two years prior thereto, the plaintiff and one Edward Donahue were partners, doing business as merchants and traders at Pioche, in said Lincoln county, under the firm name and style of Quillen & Donahue; that the said Edward Donahue, one of the partners of said firm, died at Pioche aforesaid on or about the eleventh day of February, A. D. 1873, leaving this plaintiff the sole survivor of the said firm of Quillen & Donahue; that, as such surviving partner of said firm, this plaintiff has had the care, custody and control of the business of the said late firm, and the assets thereof, and has, under the said firm name, carried on the business of said late firm, and is now so conducting the same and settling up, closing up the business of said late firm; that, between the first day of August, A. D. 1871, and the third day of December, A.D. 1874, the said defendant became and was indebted to this plaintiff, as such surviving partner of said firm, in the sum of eight hundred and five dollars and ninety cents, in gold coin, for and on account of goods, wares and merchandise, consisting, etc., by said late firm and by this plaintiff as such surviving partner thereof, between said last mentioned dates, sold and delivered to said defendant at his special instance and request, at"—etc.

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There is a second count for money lent and paid, laid out and expended by the firm, and by the survivor, between the same dates, making the aggregate sum for which judgment is demanded the same as was claimed in the original complaint.

This amended or new complaint was answered by the defendant, and the case was tried and judgment rendered on the issues raised by the amended complaint and answer.

The appellants contend that the cause of action described and set forth in the original complaint was entirely distinct and different from the cause of action upon which the judgment was recovered. They claim that what is called an amended complaint was in reality a complaint in a new suit; that no such amendment would have been possible except for the stipulation of the parties, which they never consented to, and which does not bind them, though it may bind the parties to it. They insist that their undertaking had reference only to the cause of action stated in the original complaint; that they bound themselves only "in case the said plaintiffs recover judgment in the said action," and that they are not bound because one of said plaintiffs has recovered judgment in what is substantially another action.

The respondent, on the other hand, contends that the cause of action stated in the amended complaint was the same as that stated in the original complaint; that the same proof would have supported either, and that the amendments might properly have been allowed, even without the stipulation above quoted.

We have no doubt, looking to the original and amended complaints and the subsequent proceedings in the case, that the pleader who drew the original complaint intended to state the same cause, or rather causes of action, as those upon which judgment was recovered. But we have just as little doubt that he failed to do so. The facts were undoubtedly that the firm of Quillen & Donahue had, during the lifetime of Edward Donahue, sold goods and advanced moneys to and for Steele, and that after the death of Edward Donahue the surviving partner had sold other goods and advanced other moneys to and for Steele. This is sub-

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stantially what is averred in the amended complaint, with which we must presume the proofs conformed. The right of action on both demands was in Quillen solely. As surviving partner he was entitled to sue in his own name and in his representative capacity for the amount due the firm, and was at liberty to unite with the firm debt a debt due to himself individually. (27 N. H. 289.) This is what he finally did in the amended complaint, though in a defective way; for he describes himself throughout as surviving partner, and claims to recover only in his representative capacity, whereas he should have stated separately the indebtedness accruing before the dissolution of the firm by the death of Edward Donahue and that accruing afterwards, and claimed the first in his representative and the second in his individual capacity. Defectively as it is drawn, however, it is easy to understand the meaning of the amended complaint and what proof would have been required to support it. But it seems impossible to construe the original complaint to mean the same thing or to be supportable by the same proofs. In fact, it requires a totally different construction, and could only have been supported by the proof of facts utterly variant from those stated in the amended complaint. To prove the case as it stood at the time the undertaking was executed and filed, it must have been shown that after the death of Edward Donahue, John Donahue and Quillen formed a partnership and sold goods and advanced money to Steele, and no proof of the sale of any goods or the advance of any money before the death of Edward Donahue would have been admissible, for nothing of the sort is alleged, and it was a legal impossibility that John Donahue could have any joint interest with Quillen in any demand which accrued during the lifetime of Edward Donahue. Under the new complaint, however, it was admissible to prove an indebtedness accruing to Quillen and Edward Donahue during the lifetime of the latter. Of this there can be no question; a demand could be proved under the new complaint which was in fact and in law entirely distinct from any that could have been proved under the original complaint. This is conceded; but it is contended that the in-

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tention of the pleader who drew the original complaint to include the demand accruing to Quillen and Edward Donahue was manifest, and therefore that the amendment subsequently made worked no change in the liability of the sureties. In the light of subsequent disclosures it may appear that the pleader intended to state in the original complaint the same cause of action as that stated in the amended complaint. But the defendants in this action at the time they became sureties for the defendant in that action had not the benefit of the subsequent disclosures to aid them in arriving at the meaning the original complaint may have been intended to express. They read it in its own light as a statement of the facts constituting the cause of action, and not as the statement of an erroneous theory of the legal effect of other facts which were not disclosed. They found it stated that Steele had become indebted to Quillen and John Donahue on account of goods sold and money advanced by them, "these plaintiffs," and they were not bound to infer—they had no reason to infer—that the demand was really for goods sold, not by Quillen and John Donahue after the death of Edward, but for goods sold by Quillen and Edward Donahue during Edward's lifetime. They may have known that John Donahue as administrator had no right and no business to enter into a partnership with the survivor of his intestate, but the fact that he had done so being verified they had a right to believe it. The law might not countenance such a proceeding, but it is well known that many things are actually done that are not strictly according to law. There was no reason, therefore, why the original complaint should not have been construed, according to its plain and obvious import, as the statement of a cause of action existing in favor of Quillen and John Donahue. If so, the liability of these defendants was extinguished by the amendment to the complaint; for there can be no doubt that the judgment against Steele was based, in part at least, upon an account for goods sold and money advanced by Quillen and Edward Donahue, a cause of action which was not only not included in the original complaint, but could not have been united with the cause of action therein stated.

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The law does not permit the liability of a surety to be changed without his consent. The general doctrine on this subject is very clearly stated in the opinion of Storey, J., in the case of *Miller v. Stewart*, (9 Wheat., 702): “Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be even for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal.” To the same effect are *Myers v. Edge*, (7 Term. Rep., 254), and *Walsh et al v. Bailie*, (10 Johns., 181). More directly in point is the case of *Bean v. Parker*, 17 Mass., 602. That was *scire facias* against the sureties on a bail bond. The defendants pleaded that after entry of the original action in court, there being another action pending in favor of the defendants against the plaintiff, the parties entered into a rule of court whereby they submitted the two actions, and all demands between the parties, to the determination of referees: and that the sum for which judgment was rendered was the sum reported by said referees as the balance of all demands between the parties. To this plea the plaintiff replied that the sum awarded by the referees was part of the same sum demanded in the suit in which the defendants became bail, the referees having only deducted from plaintiff’s claim in that suit part of the cross-demand, which could not have been filed in set-off or given in evidence on the trial of the action.

If this replication was true, it showed conclusively that the sureties on the bail bond had been benefited by the reference of all demands between the parties. The judgment against their principal was for a part only of what would otherwise have been recovered. The defendants, by demurring to the replication, confessed that it was true, and the court thereupon decided: “When one becomes bail for another he is responsible only for the demand contained in

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the suit upon which the principal has been arrested. Another demand cannot be substituted or added without defeating the contract of bail. It is immaterial whether the substituted demand be greater or less than the one contained in the writ. The bail has a right to say *in hæc fœdera veni*, and no other. * * * Nor is it any answer to say that the bail has gained by the agreement to refer, as is alleged in the replication to these pleas, for this will make his contract of bail, which ought to be definite and certain, to depend upon transactions of the parties, in which the bail has no concern, subsequent to his entering into the contract, and put him to the inconvenience of proving facts which may be entirely beyond his reach. When he enters into his contract he pledges himself, on certain contingencies, to pay what may be recovered in the usual course of law in the action to which his bond refers." (See also *Langley v. Adams*, 40 Maine, 125; *Hyer et al. v. Smith*, 3 Cranch C. C. 437; *Fairfield v. Baldwin*, 12 Pick. 388; *Andre v. Fitzhugh*, 18 Mich. 93; *Fullerton v. Campbell*, 25 Penn. St. 345.) The principle announced in these cases is well settled and is perfectly applicable here.

The cases cited by the respondent are not applicable. No one can deny that a court has the power to amend pleadings by adding or striking out the names of parties, plaintiff or defendant. The power is expressly conferred by section 68 of the practice act. But, although this power may be and is very liberally exercised, and very properly so, as between the parties to the action in furtherance of justice, it cannot be exercised with the effect of changing the rights and liabilities of third parties. No case has been brought to our attention, and we think none can be found, in which sureties have been held liable after a change of the cause of action.

The case of *Lord v. Clark* (14 Pick. 223), is relied on as a case in point against our conclusion. In that case, the facts stated in the writ were that Wilson being indebted to Lord, Holbrook and one Richardson, since deceased, partners, promised Lord and Holbrook, the survivors, etc. It was held, and properly held, that striking out the name of

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the deceased partner did not release Wilson's bail. The difference between that case and this is that no amendment in that case was actually required in order to support the judgment. The facts were stated correctly, and it appeared on the face of the record that one of the persons named as a plaintiff was dead and, therefore, that his name was merely surplusage.

If, in this case, the facts had been correctly stated—if, instead of averring that Quillen and John Donahue, as partners, had sold goods and advanced money to Steele, it had been shown that the goods were sold and the money advanced by Quillen and Edward Donahue, it would have appeared from the face of the complaint that John Donahue was not a proper party to the action, and his name might have been stricken out without changing the cause of action. The case in 14 Pickering would then have been an authority in respondent's favor.

The other cases referred to are liable to the same criticism. Either they were not actions against sureties, or there had been no change in the cause of action with reference to which they contracted.

The judgment and order appealed from are reversed, and cause remanded.

HAWLEY, C. J., dissenting:

The material questions presented in this case are whether there was such a change of parties by the amendments of the complaint as to introduce any new or different cause of action; whether the testimony offered to sustain the amended complaint could have been introduced to support a judgment under the original complaint.

It is well settled that the liability of a surety cannot be extended beyond the terms of his contract. He is bound only to the extent of his obligation. It is not always essential that he should sustain an injury by the change in the pleadings. He has the undoubted right to stand upon the very terms of his contract, and if without his consent the contract is changed he is released.

The original complaint in the suit against Steele seems to

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have been drawn in a very perfunctory manner. If the pleader had given the matter any thought, it is safe to assert that no such pleadings would ever have been filed. The original complaint must be interpreted without reference to subsequent amendments. So interpreted, what is the cause of action?

If the complaint is susceptible of the construction that the indebtedness sued for was due and owing to Miles Quillen and John Donahue, then, of course, it follows that the sureties were released by the amendments subsequently made without their consent.

The averment in the complaint that "said defendant became and was indebted to these plaintiffs," and that a portion of the indebtedness was "for money loaned and advanced by plaintiffs to defendant," tends to support the proposition that the indebtedness sued for, or a part thereof, was due and owing from the defendant Steele to the said Miles Quillen and John Donahue; and, in the absence of other averments, the language used might be conclusive that such was the cause of action. It is, however, the duty of this court to examine all the allegations in the complaint in order to determine the effect and meaning of any particular clause. When so examined, I think it becomes apparent that the indebtedness was not alleged to be due to Miles Quillen and John Donahue in their own right as copartners, but was due to the survivor of the late firm of Quillen & Donahue; that Miles Quillen and Edward Donahue composed that firm, and that John Donahue was made a party to this suit under the erroneous impression of counsel that, in a suit to recover an indebtedness due to a partnership after the death of one of the copartners, it was necessary to make the administrator of such deceased partner a party plaintiff to the action with the surviving partner. It is consistent with all the averments in the complaint, when taken and considered together, to so hold. The substantial facts to be gathered from the averments in the complaint, all of which are more or less imperfect, are that between certain specified dates the defendant became and was indebted to the firm of Quillen & Donahue in the sum of one thousand

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seven hundred and eighty-three dollars and forty cents; that Miles Quillen and Edward Donahue composed that firm; that Edward Donahue was dead; that John Donahue had been appointed administrator of his estate, and that the business of the firm had been continued in the firm name. Acting upon these facts, the pleader seemed to think, as a conclusion of law, that owing to the death of Edward Donahue and the appointment of an administrator of his estate, the money became due and owing to the surviving partner and the administrator, and he so averred in his complaint.

Upon the death of one of the copartners it is the duty of the surviving partner to cease the partnership trade or business. If he acts otherwise and continues the business, it will be at his own risk, and he "will be liable, at the option of the representatives of the deceased partner, to account for the profits made thereby, or to be charged with interest upon the deceased partner's share of the surplus, besides bearing all the losses." (Story on Partnership, sec. 343.) But the administrator "of the deceased partner cannot insist upon carrying on the business in partnership with the surviving partner." (Collyer on Partnership, sec. 131.) If the surviving partner takes the risk and continues the partnership trade or business, he would be entitled, in an action brought to recover the indebtedness due the firm, to include the indebtedness which accrued to him after the death of his copartner. (*Slipper v. Stidstone*, 5 T. R. 493; *Davis v. Church*, 1 Watts & Serg. 242.)

But such accounts must be separately stated. In this respect, as well as others, the original complaint was radically defective.

The authorities are numerous and uniform that actions brought to recover the amount due the firm should be in the name of the surviving partner. (Parsons on Partnership, 441-2 *et seq.*; *Murray v. Mumford*, 6 Cow. 442; *Evans v. Evans*, 9 Paige, 180; *Daby v. Ericsson*, 45 N. Y. 786; *Clark v. Howe*, 23 Maine, 560; *Barry v. Briggs*, 22 Mich. 201; *Allen v. Hill*, 16 Cal. 113; *Tompkins v. Weeks*, 26 Id. 66; *Gleason v. White*, 34 Id. 263; Probate Act, sec. 200, Comp. L. 680.)

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The discontinuance of the suit as to John Donahue, administrator, did not, in my opinion, change the parties so as to introduce any new or independent cause of action. The mere fact that a change was made does not necessarily discharge the sureties. The change must, in my judgment, be material. A party plaintiff is authorized to amend his complaint in the particulars allowed by law, and so long as such amendments do not in any respect vary the original cause of action the sureties will still be bound.

The true rule in relation to this subject is clearly announced by Parker, C. J., in *Ball v. Claflin*, as follows: "The new count offered under leave to amend must be consistent with the former count or counts, that is, it must be of the like kind of action, subject to the same plea, and such as might originally have been joined with the others. It must be for the same cause of action, that is, the subject-matter of the new count must be the same as of the old; it must not be for an additional claim or demand, but only a variation of the form of demanding the same thing. Amendments made conformably to the rule thus explained can do no injury to any one. Neither the defendant nor his bail, nor subsequent attaching creditors, have ground of complaint, when their liability is in no degree changed or affected, except merely in regard to want of form." (5 Pick. 304.)

But if any material change is made the rule is different. To use the language of the same learned justice: "When one becomes bail for another, he is responsible only for the demand contained in the suit. * * * Another demand cannot be substituted or added without defeating the contract of bail. It is immaterial whether the substituted demand be greater or less than the one contained in the writ. The bail has a right to say, *in hæc fœdera veni*, and no other." (*Bean v. Parker*, 17 Mass. 602.)

It follows from the principles announced in these cases that if Miles Quillen was the only proper party who could maintain the action as set forth in the body of the complaint, the discontinuance as to John Donahue, administrator, would be a mere variation of the form of de-

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manding the same thing, and, as such an amendment is clearly authorized by section 68 of the civil practice act, neither the defendant nor his sureties had any ground of complaint. Their liability was not thereby changed in any degree whatever.

The allegations set forth in the amended complaint under which the cause was tried were not, in my opinion, inconsistent with the original declaration. It required the same evidence to maintain the suit as it would to have sustained the original complaint. The form of the action was not changed; the identity of the cause of action was preserved; the amendments were added simply in order to cure the imperfections and mistakes in the manner of stating the plaintiff's case. The real cause of action, from beginning to end, was identical and the same. The various amendments which were allowed did not in any respect tend to change the liability of the sureties upon the undertaking for the release of the attachment, and, in my judgment, did not have the effect to release them from their liability. (*Ball v. Claflin*, *supra*; *Miller v. Clark*, 8 Pick. 411; *Lord v. Clark*, 14 Pick. 223; *Smith v. Brown*, 14 N. H. 67.)

It is true that the averments in the amended complaint upon which the cause was tried are silent as to what portion of the indebtedness accrued after the death of Edward Donahue, and are in this respect as defective as the averments in the original complaint. The defect in this respect was waived, no demurrer having been interposed upon this ground. The fact is that the indebtedness alleged in the amended complaint is for the same amount and upon the same account, and almost as imperfectly stated as in the original complaint.

The objections to the entitling of the judgment are trivial. The words "surviving partner of the late firm of Quillen & Donahue" were merely *descriptio personæ*. (*Lord v. Clark*, *supra*; *Clark v. Lowe*, 15 Mass. 476; *Winningham v. Crouch*, 2 Swan, 170; *Merritt v. Scaman*, 2 Seld. 168; *White v. Joy*, 11 How. Pr., 36), and certainly were not an essential part of the title of the suit. The capacity in which a person sues must be determined from the allegations in the complaint, and not from the title of the action.

Points decided.

There can be no question as to the identity of the judgment with the suit. The discontinuance of the suit as to the administrator appears in the pleadings, which constitute a part of the judgment-roll. (1 Comp. Laws, 1266.) In fact, it is not pretended that there was any other suit by Quillen against Steele, or that the judgment was rendered in any other action.

I am of the opinion that the judgment of the district court ought to be affirmed.

[No. 858.]

S. F. THORN, RESPONDENT, v. E. D. SWEENEY ET AL.,
APPELLANTS.

RIGHT OF EMINENT DOMAIN—PUBLIC USE.—It is within the power of the legislature to pass an act for the condemnation of land for the purpose of bringing water into cities and towns. Such a taking would be for a *public use* within the meaning of that term as used in the constitution.

INJUNCTION IN ACTIONS OF TRESPASS.—The foundation of the jurisdiction in a court of equity to issue an injunction, in aid of the action of trespass, is the probability of irreparable injury; the inadequacy of pecuniary compensation; or the prevention of a multiplicity of suits.

IDEM—PLEADINGS.—IRREPARABLE INJURY.—It is not sufficient that the complaint alleges that the injury would be irreparable. The plaintiff must affirmatively state the necessary facts to show the court that the injury will be irreparable.

IDEM—The construction of a ditch across rocky, barren and uncultivated lands is not an irreparable injury.

IDEM—EASEMENT IN LAND.—An easement in land can only be acquired by the consent or acquiescence of the owner.

IDEM—REMEDY AT LAW.—CONTINUING TRESPASS.—Where no appreciable injury will be done by the acts of defendants, that are threatened to be continued, and the defendants are solvent and able to respond in damages, an injunction will not be granted, although the title of plaintiff is undisputed. To justify the issuance of an injunction there must be cause to fear irreparable damage for which courts of law furnish no adequate remedy.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion of the court.

Argument for Appellant.

T. W. W. Davies, for Appellant:

I. The injunction should not have been issued, and should have been dissolved on motion: 1. There was no statement of facts necessary to enable the court to say that any irreparable injury had resulted, or would result to plaintiff from any acts of the defendants; 2. There was no allegation that defendants were unable to discharge and satisfy any judgment that might be obtained against them in the action; 3. The complaint on its face shows that the plaintiff had a plain, speedy and adequate remedy at law, by action of trespass or ejectment; 4. The verified answer denies all the equities of the bill, and upon its coming in, supported as it is by the testimony, the injunction should have been set aside. (Hilliard on Injunctions sec. 37, 104; *Id.* sec. 74, 45; *Id.* 318; *Id.* 572-73.)

An injunction will not be granted to restrain a trespass, unless the trespasser is insolvent, or the injury irreparable and destructive to the plaintiff's estate, to its very nature and substance; and such as calls for immediate relief. There must be something particular or special in the case for which a court of law cannot afford adequate redress. (*N. Y. Printing Co. v. Fitch*, 1 Paige, 97; *Cooper v. Hamilton*, 8 Blackf. 377; *Cowles v. Shaw*, 2 Clarke, 496; *Rankin v. Charles*, 19 Mo. 490; *Malvany v. Kennedy*, 26 Penn. 44; *Catching v. Terrell*, 10 Geo. 576; *Schurmeir v. St. Paul, etc.*, 8 Minn. 113; *Whitman v. St. Paul etc.*, *Id.* 116; *Justices v. Cosby*, 5 Jones Eq. 254; *Bolster v. Catterline* 10 Ind. 117; *Hatcher v. Hampton*, 7 Geo. 49; *Justices v. The Griffin and West Point P. R. Co.*, 11 Geo. 246; *Stewart v. Chew*, 3 Bland. Ch. 440; *Waldron v. Marsh*, 5 Cal. 119; *Wells, Fargo & Co. v. Dayton*, 11 Nev. 169; *Ritter v. Patch*, 12 Cal. 299; *Branch Turnpike Co. v. Supervisors of Yuba Co.*, 13 Cal. 190.)

II. The statute of 1866, amended in 1869 (Comp. L. vol. 2, 415), is not in conflict with any provision of the constitution of this state.

III. Land is taken for public use within the meaning of the law of eminent domain, whenever its taking is for the general public advantage.

Argument for Respondent.

The conveying of water into a city for general use is in the strictest sense a public use. Water is a prime necessity of life, and a copious supply of the same in any city or town is promotive of the health, comfort and convenience of the inhabitants, as well as enhancing the safety and consequent value of property. (*Hildreth v. Lowell*, 11 Gray, 345; *Lumbard v. Stearns*, 4 Cush. 60; *Burden v. Stein*, 27 Ala. 104; *Reddall v. Bryan*, 14 Md. 444; *People v. Nearing*, 27 N. Y. 306; *Anderson v. Kerns Co.*, 14 Ind. 199; *Miller v. Craig*, 3 Stock, N. J. 175; *Dingley v. City of Boston*, 100 Mass. 544; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Edwards v. Stonington Association*, 20 Con. 406; *Pocopson Road*, 16 Penn. St. 15; *Stevens v. Walker*, 15 La. An. 577; *Mt. Washington Road*, 35 N. H. 134; *Ash v. Cummings*, 50 N. H. 591; *Jordan v. Woodward*, 40 Me. 317; *Burges v. Clarke*, 13 Ired. 109; *Crenshaw v. State River Co.* 6 Rand. 245; *County Court v. Griswold*, 58 Mo. 175; *Matter of Cent. Park*, 63 Barb. 282; *Trabue v. Macklin*, 4 B. Mon. 407; *Brooklyn Park Com. v. Armstrong*, 45 N. Y. 234; *Dayton M. Co. v. Seawell*, 11 Nev. 400.)

Robert M. Clarke, for Respondent:

I. Defendants acquired no right to or easement in respondent's land by virtue of the proceedings for condemnation: 1. Because they did not secure the compensation awarded as required by the constitution of the state, nor did they keep their tender good as required by the statute. (Art. 1, Cons. Nev., C. L. 416.) 2. The use to which respondent's land is sought to be condemned is not a public but a private use, and it is forbidden by the constitution to take private property for private use. (Sedgwick on Stat. and Const.; Cooley on Const. Limit. 530, 531.) There can be no public use without a public right; 3. The act of the legislature under which the land was attempted to be condemned is unconstitutional and void; (a) Because it seeks to take private property for private use; (b) Because the method provided by the act "is not due process of law." (Cooley on Const. Limit., pp. 356-7; Sedgwick, S. & C., Const. 537, 538, 539, 610, 611, 612.)

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By the Court, HAWLEY, C. J.:

This appeal is from an order refusing to dissolve a temporary injunction. The motion to dissolve is based upon the complaint and answer, and oral testimony submitted at the hearing.

The complaint alleges that plaintiff is the owner in fee of certain land; that the defendants unlawfully entered upon it, dug up and removed the soil, dirt and earth thereon, and excavated and made a ditch for the purpose of conducting water therein, and with the intent and purpose to establish and acquire an easement and servitude in said land, to the injury of said land, to plaintiff's damage in the sum of five hundred dollars; that defendants are upon said land removing the soil, dirt and earth therefrom, and threaten to continue said acts, and to complete and maintain said ditch, easement and servitude, and to turn water into the same when completed, and to continue to flow water through the same and across the land of the plaintiff perpetually in the future, to the permanent and irreparable injury of the plaintiff and his said land.

The answer admits that the plaintiff is the owner of the land; it denies that defendants, or either of them, unlawfully committed the acts alleged; denies that by their acts "the plaintiff has been, is, or will be damaged irreparably," or that he has been, is, or will be, damaged in any sum whatever.

For further answer, the defendant, M. Rinckel, avers that he is the owner of the Carson water works, with all its privileges, franchises, property and appurtenances, and being so the owner of the same he desired to construct a ditch through plaintiff's land, to be used in connection with said works; that said defendants, being unable to obtain the consent of said plaintiff to construct said ditch, by offering to pay full compensation for said land, and for all injury that might be done thereto, proceeded under the provisions of the act entitled "An act to allow any person, or persons, to divert the waters of any river or stream, and run the same through any ditch or flume, and to provide for the

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right of way through the lands of others," (2 Comp. L. 3852 to 3855); that the defendants selected an appraiser, and (the plaintiff refusing to act under said law) this appraiser selected another, and these two selected a third, and the appraisers thus selected assessed the damages at twenty-five dollars, which amount was, by defendants, tendered to plaintiff, and by him refused; that defendants have in all respects complied with the provisions of said law; that the land over which the ditch would run is rocky, barren and of no value whatever; that plaintiff has not and will not suffer any damage whatever by the entry of defendants or by the construction of a covered ditch across his land; that defendants, and each of them, are solvent and able to respond in damages in any sum that plaintiff may recover against them. The defendant Kinckel further avers that he has been damaged in the sum of one hundred dollars, and that he will be further damaged in the sum of twenty dollars per day for each and every day that he is prevented from completing said ditch by being "deprived of the use of the water in his reservoir for said water works for the supply of persons in Carson city." It is also alleged that plaintiff has a plain, speedy and adequate remedy at law.

The oral testimony substantiates the material allegations in the answer.

Respondent claims that the act under which the defendants sought to condemn his land is unconstitutional and void for two reasons: "First. Because it seeks to take private property for private use; Second. Because the method provided for the condemnation of the land is not by due process of law. And he therefore contends that, inasmuch as defendants obtained no rights by virtue of said act, and as they admit his title to the land, he is entitled as matter of right to the injunction, because the defendants threaten to continue their unlawful acts, and acquire an easement in said land.

We think the principles decided by this court in *Dayton Gold and Silver Mining Company v. Seawell* (11 Nev. 394) are conclusive upon the point that it is within the power of the legislature to pass an act providing for the condemnation

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of land for the purpose of bringing water into cities and towns, and that such a taking would be for a "public use" within the meaning of that term as used in the constitution.

The second objection urged by respondent's counsel presents a question of grave importance, which ought not to be decided without mature consideration, and it is one which, from the views we take of this case, it is unnecessary at the present time to decide.

Admitting for the sake of the argument, without deciding the point, that the act is in this respect unconstitutional, does it necessarily follow that the injunction should not be dissolved? We think not. The foundation of the jurisdiction in a court of equity to issue an injunction, in aid of the action of trespass, is the probability of irreparable injury; the inadequacy of pecuniary compensation; or the prevention of a multiplicity of suits where the rights are controverted by numerous persons. In our opinion the facts of this case do not bring the plaintiff within this rule.

It is not sufficient that the complaint alleges that the injury would be irreparable. The plaintiff must affirmatively show how and why it would be so, otherwise the extraordinary remedy by injunction ought not to be allowed. The allegation that defendants will acquire an easement or servitude in the land is answered by the fact that no such easement or servitude could be acquired except by the consent or acquiescence of the plaintiff. (*Washburn's Easements and Servitudes*, 3 ed., 113, 131, 160.)

The construction of a ditch across the rocky, barren and uncultivated land of plaintiff is not an irreparable injury. (*Waldron & Joiner v. Marsh et al.*, 5 Cal. 119.) If any injury is done to the land by the construction of the ditch the defendants are solvent and able to respond in damages, and the plaintiff has a plain and adequate remedy at law.

This brings us to a consideration of the real question at issue, whether the plaintiff is entitled to the injunction as a matter of right, notwithstanding the fact that the injury will be slight and the damages trivial, because the defendants threaten to continue their illegal acts. It is well settled,

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that where the title is undisputed, or has been settled by an action at law, and the plaintiff is liable to be irreparably injured by the continued acts of trespass, an injunction should issue. This rule, very properly, prevails in all cases where, as in *Daubenspeck v. Grear*, the plaintiff is threatened with injuries which would, if committed, result in the destruction of his property.

In such a case “the fact that the defendants are willing to pay for the property is immaterial, for there are no means of determining whether the value of the property in money would compensate the plaintiffs for its destruction.” (18 Cal. 443.) But whilst this rule is universal it does not by any means follow that the same rule prevails as a matter of course, simply because the title is undisputed, where no appreciable injury will be done by the acts that are threatened to be continued. This fact is clearly pointed out in the opinion of the chancellor in *Jerome v. Ross*, a leading case upon this subject. “I do not know a case,” says the chancellor, “in which an injunction has been granted to restrain a trespasser, merely because he was a trespasser, without showing that the property itself was of peculiar value and could not well admit of due recompense, and would be destroyed by repeated acts of trespass. In ordinary cases the damages to be assessed by a jury will be adequate for a check and for a recompense.

“Every man is undoubtedly entitled to be protected in the possession and enjoyment of his property, though it may be of no intrinsic value. He may have on his land a large mound of useless stone or sand, which he may not deem worth the expense of inclosing, and yet it would be a trespass for any person to remove any portion of the stone or sand without his consent; and he would be entitled to his action, even though the damages were nominal. But would it be proper for this court to assume cognizance of such a trespass and lay the interdict of an injunction upon it? I apprehend not.” (7 John’s Ch. 334.) In answering the objections as to a multiplicity of suits, the learned chancellor, in the same case, says: “A court of equity will sometimes interfere to prevent a multiplicity of suits, by a

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bill of peace. * * * But that is only in cases where the right is controverted by numerous persons, each standing on his own pretensions, and it has no application to the case of one or more persons choosing to persevere in acts of trespass, in despite of suits and recoveries against them. A troublesome man may vex and harass his neighbor, by throwing down his fences and turning cattle upon his grounds, or by passing over them, or otherwise annoying him; but it is to be presumed that repeated recoveries for damages, with the punishment of costs, and such smart money as a jury would naturally give, would soon effectually correct any such disposition. At any rate, I do not know that a court of equity has ever interfered merely to correct such a practice, and it would certainly require very strong evidence of the inefficacy of the ordinary legal remedies for compensation, as well as for correction, before this court would venture to assume a jurisdiction hitherto unknown." (p. 337.) Equally clear and positive is the language of the vice-chancellor in *Wood v. Sutcliffe*: "Whenever a court of equity is asked for an injunction in cases of such a nature as this, it must have regard not only to the dry, strict rights of the plaintiff and defendant, but also to the surrounding circumstances; to the rights or interests of other persons, which may be more or less involved; it must, I say, have regard to those circumstances before it exercises its jurisdiction (which is unquestionably a strong one) of granting an injunction. * * * I cannot assent to the proposition that, on the mere dry fact of the plaintiff's having the abstract right, a court of equity will, as a matter of course, on that right being established at law, grant an injunction if the right be infringed ever so minutely." (42 Eng. Ch. 165.)

The rule applicable to the facts of the case under consideration is very fully and correctly stated in a carefully considered opinion, in *Bassett v. Salisbury Manufacturing Co.*, where the question was presented to the court whether a judgment in a suit at law establishing the plaintiff's title justified the issuance of an injunction where the trespasses complained of, though slight and trivial, were threatened to be continued. The court say: "The power to grant in-

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junctions to prevent injustice has always been regarded as peculiar and extraordinary. It is not controlled by arbitrary and technical rules, but the application for its exercise is addressed to the conscience and sound discretion of the court. Ordinarily it will not be exercised when the right of the complainant is doubtful and has not been settled at law; and even when it has been so settled, an injunction will not be granted when the remedy at law is adequate. It is not enough that an injury merely nominal or theoretical is apprehended, even although an action at law might be maintained for it; but to justify the interposition of this summary power, there must be cause to fear substantial and serious damage, for which courts of law could furnish no adequate remedy. What injuries shall be regarded as irreparable at law must depend upon the circumstances of the particular case. If the injury be trivial, as by * * * raising the water of a river a few inches upon his rocky shore, doing him no appreciable or serious damage, equity would not ordinarily interfere by injunction; even in cases where the right had been established at law, for the power is extraordinary in its character, and is to be exercised in general only in cases of necessity, and when the court can see that other remedies are inadequate to do justice between the parties; and even then it is to be exercised with great care and discretion. If the granting of an injunction would necessarily cause great loss to the defendant, a loss altogether disproportioned to the injury sustained by the plaintiff, that fact should be considered in determining whether the application should be granted, and in some cases it would justly have great weight. It has often been supposed that when the right has been established at law, the plaintiff would be entitled to an injunction as matter of course; and this misapprehension has arisen probably from the fact that in a large number of cases injunctions have been refused upon the express ground that the title of the plaintiff had not been established at law, leaving room for the inference that if it had been so established the injunction would have been issued. This, however, is clearly not the doctrine of courts of

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equity, for they will not ordinarily exercise this summary and extraordinary power when substantial justice can be done by courts of law." (47 N. H. 437.)

The doctrine announced in this case is fully supported by the following authorities: *Bigelow v. The Hartford Br. Co.*, 14 Conn. 565; *Wason v. Sanborn*, 45 N. H. 170; *Blake v. City of Brooklyn*, 26 Barb. 301; *Murray v. Knapp*, 42 How. Pr. 462; *Id.* 62 Barb. 566; *Nicodemus v. Nicodemus*, 41 Md. 537; *Weigel v. Walsh*, 45 Mo. 560; *Herbert v. Carslake*, 11 N. J. Eq. 241; *Catching v. Terrell*, 10 Ga. 578; *Wooding v. Malone*, 30 Ga. 980; High on Inj. secs. 459, 483; Eden on Inj. 231; 2 Story Eq. 925, 928.

It follows from the views above expressed that plaintiff is not entitled to the extraordinary remedy he seeks.

The discretion with which the *nisi prius* judge is clothed in granting or refusing injunctions is a legal, not an arbitrary, discretion. It seems to us quite clear that no restraining order ought to have been issued upon the complaint in this action. It is evident that it ought to have been dissolved upon the motion, and showing made by defendants.

In the consideration of this case, we have treated the defendants as naked trespassers. Their acts, however, were neither wanton nor malicious. It is manifest that their object was not to destroy the substance of plaintiff's estate, or in any manner to injure his property to an extent that could not be fully compensated in damages. They threatened to continue their acts, not for the purpose of destroying plaintiff's property, but with intent to save their own. They acted from beginning to end in apparent good faith, offering in advance to fully compensate plaintiff for any injury that he might receive. This being refused, they proceeded in strict compliance with the provisions of an existing statute that has never been declared unconstitutional by this court. These were proper matters for the court below to have taken into consideration, and would certainly have fully justified it in dissolving the injunction.

If it is finally decided that the law is constitutional, then the plaintiff will be bound by the award of the arbitrators;

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otherwise he will be entitled to recover damages for whatever injury, if any, he has sustained by reason of the acts complained of.

The order of the district court refusing to dissolve the injunction is reversed; the injunction is dissolved, and the cause remanded for further proceedings.

[No. 8517.]

P. W. JOHNSON AND E. REINHART, APPELLANTS, v.
THE BADGER MILL AND MINING COMPANY ET
AL., RESPONDENTS.

NOTICE OF APPEAL AND UNDERTAKING ON APPEAL—WHEN MUST BE FILED.—

In construing sections 331 and 348 of the civil practice act: *Held*, that a copy of the notice of appeal, as filed, must be served before or at the time of filing the undertaking on appeal.

MOTION to dismiss appeal.

The facts appear in the opinion.

Ellis & King, for the motion:

Cite *Towdy v. Ellis*, 22 Cal. 651; *Carpenter v. Williamson*, 24 Cal. 609; *Buffendeau v. Edmonson*, 24 Cal. 95.

Thomas H. Wells, against the motion.

By the Court, HAWLEY, C. J.:

Respondents move to dismiss the appeal herein, upon the ground that no undertaking on appeal was filed after the notice of appeal was served.

The record shows that the notice of appeal was filed April 16, 1877, but service thereof was not made until April 20, 1877. The undertaking on appeal was filed April 16, 1877. Section 331 of the civil practice act provides as follows: "The appeal shall be made by filing with the clerk of the court with whom the judgment or order appealed from is entered a notice, stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney." (1 Comp. L. 1392.)

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It was decided by this court, in *Lyon County v. Washoe County*, that “the filing of the notice of appeal must precede, or be contemporaneous with the service of the copy.” (8 Nev. 177.) But the appeal is not made until the notice is served. The appeal is taken by filing and serving the notice. (*Lambert v. Moore*, 1 Nev. 344; *Peran v. Monroe*, 1 Nev. 484.) To render the appeal so taken effectual a written undertaking, executed upon the part of appellant, must be filed, or a deposit made with the clerk, within five days after the notice of appeal is filed. (1 Comp. L. 1402.)

Section 348 gives the adverse party five days after the filing of the undertaking to except to the sufficiency of the sureties. (1 Comp. L. 1409.)

By comparing these sections of the practice act, it seems to us that the copy of the notice of appeal, as filed, must be served on the proper party before or at the time of filing the undertaking on appeal. This construction, as was said by the supreme court of California, in *Buffendeau v. Edmonson*, “is rendered imperative in order to secure to the respondent the full five days from the filing of the undertaking within which to except to the sufficiency of the sureties.” (24 Cal. 96.)

In *Carpenter v. Williamson et al.* (24 Cal. 609), the undertaking on appeal was filed one day after the filing of the notice of appeal, and one day before the notice was served. The court dismissed the appeal upon the ground that the undertaking was filed before the notice of appeal was filed and served.

Appellants having failed to file an undertaking on appeal after the notice of appeal was filed and served, it follows that the appeal must be dismissed. It is so ordered.

Statement of Facts.

[No. 844.]

EX PARTE JOHN B. ROBINSON.

DRUMMER ACT CONSTITUTIONAL.—In construing the act of February 20, 1877 (Statutes 1877–79), commonly known as the drummer act: *Held*, that the act is a revenue law, imposing a tax upon drummers and traveling merchants who go from place to place soliciting orders for goods, wares, and merchandise; that it does not impose any impost or duty upon imports, and does not interfere with the power of congress to regulate commerce among the states, and is not repugnant to any provision of the state or federal constitution.

POWER OF STATE TAXATION.—The power to tax all the property and business within the state is an essential attribute of its sovereignty; there is no restraint upon its exercise, when within constitutional limits, except the responsibility of the members of the legislature to their constituents.

SECTION 1, ARTICLE 10, OF THE CONSTITUTION, CONSTRUED.—In construing section 1 of article 10 of the state constitution: *Held*, that it refers particularly to the levy of *ad valorem* taxes on all property, real and personal, and does not apply to licenses imposed for conducting any business or profession.

HABEAS CORPUS before the supreme court. The petitioner sets forth that he is unlawfully imprisoned, detained, confined and restrained of his liberty by the sheriff of Storey county; that he is illegally held and restrained of his liberty under the act of the legislature, entitled “An act to amend an act to provide revenue for the support of the government of the state of Nevada, approved March 9, 1865;” amended March 4, 1871 (approved February 20, 1877); that he is a citizen of the United States, and resides in the state of California; that the imposition of the license or tax required by the provisions of said act deprives him, and the persons he represents, of the privileges and immunities of citizens in the state of Nevada, or in other states; that the act is in violation of the constitution of the United States, in this: that it is an attempt to regulate commerce between the different states; that it imposes a tax, and discriminates against persons engaged in selling all kinds of goods, wares and merchandise, and excepts from such tax persons engaged in selling fruits or agricultural products; that the act is in violation of the provisions of the constitution of the state of Nevada, in this: that it pro-

Argument for Petitioner.

vides for the collection of a tax upon petitioner in every county in the state of Nevada, and was imposed, not for the purpose of revenue, but for prohibition of persons transacting such business as petitioner is engaged in.

Lewis & Deal, for Petitioner:

I. The license fee demanded is a tax. The act in question levies an unequal tax in contravention of our constitution, requiring all taxes to be uniform and equal. It levies an impost on imports. It is an interference with interstate commerce, and is therefore void. All taxation should be equal and uniform. (Const. Nev. art. X, sec. 1.)

There must not only be a uniform rate of taxation, but the tax must be equal. (20 La. An. 373.) The only question that can arise in these cases is simply as to what shall constitute uniformity and equality. When the tax is direct on property, there is no difficulty; but when a license-tax is imposed, it may often be a difficult thing to preserve uniformity and equality. But it is clear to us that no matter what the difficulty, the legislature must do all it can to attain that end. One method adopted for that purpose in case of license-tax, is to regulate the cost of the license by the amount of business done, or profits derived from the business licensed; and that, indeed, is the usual course pursued when the license is imposed on merchants. But in this case, the court will observe that the license-tax is the same on all persons soliciting orders—the man who obtains no orders at all and the one who may obtain hundreds; the solicitor who sells thousands of dollars worth of goods and the one who sells none. As an illustration of what is meant by equality and uniformity of taxation, we call attention to the case of *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 15.

It has always been held by the supreme court of the United States, and we believe by most of the state courts, that a license required of a person for the privilege of selling merchandise is a tax on the merchandise so sold. (*Brown v. State of Maryland*, 12 Wheat. 444; 91 U. S. Rep. 278-9; 2 Cush. 572; 11 Gill & J., 506; Cooley on Const.

Argument for the State.

Lim., 201; *Almy v. State of Cal.*, 24 How. 169; *Freight tax cases*, 15 Wall. 272-3; *Henderson et al. v. Mayor of New York*, 92 U. S. Rep. 268.)

There is a wide distinction between the power to license merely, and the power to raise revenue by means of licenses. The act imposes a different rate of taxation on property sold by solicitors from what it does on property or goods brought into the state in any other way.

II. The law in question is an interference with inter-state commerce, and is, therefore obnoxious to that provision of the federal constitution which confers upon congress the power to regulate commerce between the states. (Art. I, sec. 8.) We maintain that the supreme court has so held in several cases, and that, therefore, this question is *res adjudicata*. It was necessarily so held in the case of *Almy v. California*, for a law imposing a tax on gold shipped from California to New York was annulled. (*Woodruff v. Parham*, 8 Wall. 123; *Freight tax case*, 15 Wall. 232; *Welton v. State of Missouri*, 91 U. Rep., 280-282.)

The law virtually and in effect says to the California merchant: "You shall not sell goods in the state of Nevada, until you have taken out a license and paid therefor an onerous tax." This is the effect of the law, and therefore it must be construed as if such were its language, for it is to the effect and not to the language that the court must look when giving construction to acts of this kind. (*Henderson v. Mayor of New York*, 92 U. S. Rep. 268.)

It appears to us that every authoritative case upon this subject in the supreme court of the United States is against the validity of the act in question. All the reasoning in the case of *Brown v. State of Maryland* (12 Wheat. 417), is in favor of the position taken by us. So with the case of *Welton v. Missouri* (91 U. S. Rep., 275; and the case of the *State Freight Tax* (15 Wall. 232), it appears to us is on all fours with this case. So, also, *Almy v. California*, 24 How. 169.

T. W. W. Davies, for the State:

I. The present writ is not the proper remedy. If the

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petitioner is not satisfied with the law under which his arrest was made, he must seek its invalidation in some other mode. The functions of the writ of *habeas corpus*, where the party who has appealed to his aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the court by which it was issued, and the validity of the process upon its face. (*Platt v. Harrison*, 7 Iowa, 80; *Commonwealth v. Lucky*, 1 Watts, 67, and *In re Callicot*, 8 Blatchford C. C. R. 89; *Ex parte McCullough*, 35 Cal. 100; *Ex parte Winston*, 9 Nev. 73.)

II. Independent of her duties to the federal government, the state of Nevada is a sovereignty, and as such possesses unlimited powers of taxation over all the property and business within her limits, except where the state constitution has made limitations. (*Gibson v. Mason*, 5 Nev. 292; *Ex parte Crandall*, 1 Id. 294.) There is nothing in the constitution to prevent the legislature from exempting the agricultural products of the state. The legislature can give direct premiums to any branch of industry it may desire to patronize or encourage. If a sum of money can be appropriated to pay an inventor for his invention, or a farmer for a skillfully conducted farm, or a mechanic for an improvement in his art, what is to hinder the indirect encouragement of the same persons by adopting the revenue laws to the same purposes. Bounties are given for the boring of artesian wells in desert districts; for the reclamation by drainage of swamp lands; for the planting of forest trees; and for the destruction of noxious animals; all tending to the encouragement of agricultural interests.

III. The act cannot be considered as a regulation of commerce. A state may require a license from any person offering to sell goods imported from another state. (*License Cases*, 5 How. 573; *Nathan v. Louisiana*, 8 How. 73; *Ex parte Crandall*, 1 Nev. 205; *Houston v. Moore*, 5 Wheat. 48, *Passenger Cases*, 7 How. 283; *Wilson v. The Blackbird Creek Marsh Co.*, 2 Pet. 245.) The license required by the law is equal and uniform. (*Ex parte Crandall*, 1 Nev. 294; *Crow et al. v. State of Missouri* (dissenting opinion by Napton, J.), 14 Mo. 322; *Gibson v. Mason*, 5 Nev. 283.)

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IV. The grant of power to congress to regulate commerce is a mere affirmative grant of power not exclusive in its character, not affecting in the slightest degree the taxing power of the states. The federal government has an ample and full protection to an efficient exercise of this power over commerce, in the supremacy of its laws, made in pursuance of the constitution over any conflicting state enactments, and in the total prohibition to the states of all power to impose duties on imports or exports or tonnage. (*Nathan v. Louisiana*, 8 How. 73; *License Cases*, 5 Id. 573; *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 261; *Gibbons v. Ogden*, 9 Wheat. 1; *New York v. Miln*, 11 Pet. 102; *Cooley v. Board of Wardens of Philadelphia*, 12 How. 299; *Paul v. Virginia*, 8 Wall. 168; *Houston v. Moore*, 5 Wheat. 1; *Sturges v. Crowninshield*, 4 Id. 196; *Livingston v. Van Ingen*, 9 John. 507; *McCullough v. Maryland*, 4 Wheat. 428; 9 Wheat. per Marshall, C. J. 200; 5 Wheat. per Washington, J. 21, and per Storey, J. 49; 2 Pet. per Marshall, C. J. 252; 2 Wheat. per Marshall, C. J. 448; 11 Pet. per Barber, J. 134-5-6-9-40-1; per Thompson, J. 145, 6-151; 5 How. per Taney, C. J. 574, 578-586, 607-8; per Catron, J. 607; per Nelson, J. 618; per Woodbury, J. 618-19, 624-5; 9 Wheat. per Marshall, C. J. 199; Id. 210-11.)

V. The presumptions are always in favor of the rightful exercise of the law-making power, and courts will only interfere in cases of clear and unquestioned violation of the fundamental law. (*Ash v. Parkinson*, 5 Nev. 35, and the cases cited in the opinion of the court.)

John R. Kittrell, Attorney-General, also for the State, argued the case orally:

By the Court, HAWLEY, C. J.:

Petitioner is a merchant engaged in the manufacture and sale of wood and willow ware in the state of California. He was arrested in Virginia city on a warrant regularly issued by a justice of the peace, upon a complaint charging him with selling goods, wares and merchandise without a license, as required by the act of the legislature of this

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state, "approved February 20, 1877," the first section of which, in amending section 67 of the revenue act, provides that every traveling merchant, agent, drummer or other person selling or offering to sell any goods, wares or merchandise of any kind, to be delivered at some future time, or carrying samples and selling, or offering to sell goods, wares or merchandise of any kind similar to said samples, to be delivered at some future time, shall pay for such license twenty-five dollars per month; provided, that nothing in this section be so construed as to apply to the sale of fruits or the agricultural products of this state or any other state or territory of the United States." (Stat. 1877, 79.) The same section provides that any person so offering any goods, wares or merchandise for sale without a license, shall be guilty of a misdemeanor.

The evidence shows that petitioner visited Virginia city in this state as a traveling merchant, solicited and procured orders for goods in his line, and sent the orders to the firm of which he is a member at San Francisco, California, to be filled. It is admitted that he comes within the provisions of the act of the legislature; but it is claimed that the act is unconstitutional and void. It is argued: First; that the license fee imposed by said act is a tax. Second; that the act levies an unequal tax in violation of article X, section 1, of the constitution of this state, which declares that "the legislature shall provide by law for a uniform and equal rate of assessment and taxation." Third; that it levies an impost on imports. Fourth; that it is an interference with inter-state commerce.

1. We are of opinion that the act is a revenue law imposing a tax upon the business of drummers and traveling merchants, who go from place to place throughout this state, soliciting orders for goods, wares and merchandise, and that this state has an undoubted right to tax its own citizens and citizens of other states coming within its jurisdiction and engaging in any particular business or profession, and that such a law is not repugnant to said provisions of our state constitution. The power to tax all the property and business within this state is an essential attribute of

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its sovereignty, and there is no restraint upon its exercise when within constitutional limits, except the responsibility of the members of the legislature to their constituents. That all licenses ought, in justice and fairness, to be as nearly equal and uniform as possible, is one of those self-evident propositions that admits of no argument to the contrary. But the question as to the best method of imposing a license so as to attain that end is, in our opinion, left very much to the good sense and sound judgment of the legislature. It may be that the standard adopted in this case is not as beneficial or equal in all respects as others that might have been selected; but if the legislature has kept within the limits of the constitution, its power is supreme. It is true the legislature might have divided the traveling merchants into classes, and provided that those doing business in the aggregate to the amount of five thousand dollars per month should constitute the first-class, and pay a license of fifty dollars per month; those doing business to the amount of four thousand dollars, and less than five thousand dollars per month, should constitute the second class, and pay a license of forty dollars per month, etc., etc. But even then the tax would be unequal, because the person who sold only four thousand dollars' worth of goods would have to pay the same license as a person who sold four thousand nine hundred and ninety-nine dollars' worth, etc., etc.

It is useless to point out further illustrations, as it is settled beyond all controversy that no revenue law which divides the business of merchants, saloon-keepers, hotel-keepers, etc., etc., into classes is ever framed upon any rule of mathematical equality. Yet, such laws exist in many of the states, and are almost uniformly upheld by the courts.

We are of opinion that section 1 of article 10 of the constitution refers particularly to the levy of *ad valorem* taxes on all property, real and personal, which can and must be comparatively uniform and equal and does not apply to licenses imposed for conducting any business or profession which, from the very nature of the case, cannot be made perfectly uniform and equal.

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The following authorities hold that the language of constitutions, similar to ours, refers only to taxes levied upon real and personal property according to its true value: *People v. McCreery*, 34 Cal. 448; *People v. Thurber*, 13 Ills. 555; *City of East St. Louis v. Wehrung*, 46 Ills. 392; *The Texas Banking and Insurance Company v. The State*, 42 Tex. 636; *Blessing v. The City of Galveston*, 42 Tex. 642; *Chilvers v. The People*, 11 Mich. 50; *Henry v. The State*, 26 Ark. 523; *Straube & Lohman v. Gordan*, 27 Ark. 625; *Bohler v. Schneider*, 49 Ga. 195; *The Home Insurance Company v. City Council of Augusta*, 50 Ga. 543; *Adams v. Mayor of Somerville*, Head. 363. But admitting, for the sake of the argument, that the constitution does apply to licenses on business, is not the tax imposed in this case as uniform and equal as the constitution requires? The same license fee is required of every person who engages in the particular business designated by the act.

In the city of *New Orleans v. Home Mutual Insurance Company*, where the ordinance under consideration imposed a license upon insurance companies and divided the same into classes and required a license fee from each in proportion to the amount of premiums received, the supreme court say: "The tax imposed is for a license to carry on a business or occupation. It is the price exacted for the privilege to pursue a profession, trade or occupation. The constitution requires that a license tax, as well as a tax on property, shall be equal and uniform. To be equal and uniform, the tax imposed must be the same upon all who engage in the particular profession or calling taxed, without reference to the abilities, fortunes or successes of those engaged in business taxed. * * * The ordinance in question fixes unequal taxes upon persons pursuing the same occupation. It is, therefore, unconstitutional and void." (23 La. An. 449. See also the *State v. Endom*, 23 La. An. 663; *Hodgson v. City of New Orleans*, 21 La. An. 301.)

From a review of the authorities, it will readily be seen that, in either view of the case as to the meaning of the constitutional provision, the act must be upheld. If we are

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correct in holding that the license imposed by the act is a tax upon a business, and not upon property, then it necessarily follows that the question argued by counsel, as to the power of the legislature to exempt any property from state taxation, is not involved in this case, and upon that point we express no opinion.

2. The act is not, in our judgment, in conflict with any of the provisions of the constitution of the United States. The provisions of the act are general in their character, and apply as well to citizens of this state as to citizens of other states; to the fruits and agricultural products of other states as well as of this state. There is no discrimination between the citizens of Nevada and of other states. In this respect the act is essentially different from the acts declared unconstitutional in *Ward v. Maryland*, 12 Wall. 418; *Welton v. State of Missouri*, 91 U. S. 275; and *Crow v. State*, 14 Mo. 295. There is no valid reason why the citizens of other states, who come within our jurisdiction and engage in business in this state, should be exempted from the payment of licenses properly imposed upon our own citizens.

3. In considering the question whether the act is in contravention of those provisions of the constitution which declare that congress shall have the power to regulate commerce among the several states, and that no state shall, without the consent of congress, lay any imposts or duties on imports or exports, the supreme court of the United States has repeatedly declared that the line drawing the limits of state sovereignty in imposing taxation and the duty of the federal government to regulate and protect interstate commerce, is always difficult to be traced; that no general rule can be laid down; that the character of each case must be distinctly kept in mind, and the decisions of the court are based upon the particular facts of each individual case. It is quite difficult, if not impossible, to draw any general line that will mark with any degree of precision where the commercial power of congress ends, and where the power of each state begins.

The case of *Brown v. State of Maryland* (25 U. S. Rep.

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12 Wheat. 419), upon which petitioner chiefly relies, has no application to the facts of this case. In that case Brown was indicted for having imported and sold a package of dry goods without a license, contrary to the provisions of an act of the legislature of the state of Maryland which required all importers, before the sale of their imported articles, to take out a license. The supreme court of the United States held that a tax on the sale of an article, imported only for sale, is a tax on the article itself; that the importation gave a right to the importer to sell the package in question free from any charge by the state and, consequently, that the act of Maryland was unconstitutional and void, as being repugnant to that article of the constitution which declares that “no state shall, without the consent of congress, lay any imposts or duties on imports or exports,” and also to that clause which empowers congress “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

The decision of the court turned upon the fact that Brown, being the importer of the package, had the undoubted right to dispose of it, and that this right continued as long as the package remained the property of the importer and was unbroken. In other words, that as a sale is the object of all importation of goods, the power to allow importation necessarily implies the power to authorize the sale of the thing imported; and, therefore, that any penalty imposed for disposing of goods in the character of an importer was in violation of said provisions of the constitution of the United States.

The case of *Brown v. State of Maryland* has been repeatedly cited and discussed in subsequent decisions of the court and, while adhering to it as an authority, the court has frequently declared that the principles therein decided ought not to be extended to any case not coming clearly within the facts which there existed. As we have already stated, the facts of that case are not, in our judgment, analogous in any respect to this. It is unnecessary in this case to discuss the question as to the extent of the power given to Congress to regulate commerce, or to review the

authorities relative to the prohibition upon the states from imposing any duty upon imports, because if we are right in the conclusions before stated, that the act is a revenue law imposing a tax upon all persons who engage in a certain business, then it does not come within the reasoning of the court in *Brown v. State of Maryland*, and other cases cited by petitioner's counsel. The act does not impose any impost or duty upon imports, and it does not, in our opinion, interfere with the power of congress to regulate commerce among the states.

In the *City of New York v. Miln*, which was an action of debt brought in the circuit court of the state of New York by the plaintiff to recover of the defendant, as consignee of a ship, the amount of certain penalties imposed by a statute of that state entitled "An act concerning passengers in vessels coming to the port of New York," the court discuss at length the case of *Brown v. State of Maryland*, and in drawing the distinction which existed between the two cases, say: "It is difficult to perceive what analogy there can be between a case where the right of the state was inquired into, in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to its rights over persons within its acknowledged jurisdiction. The goods are the subject of commerce; the persons are not. The court did, indeed, extend the power to regulate commerce, so as to protect the goods imported from a state tax after they were landed, and were yet in bulk; but why? Because they were the subjects of commerce, and because, as the power to regulate commerce, under which the importation was made implied a right to sell, that right was complete, without paying the state for a second right to sell, whilst the bales or packages were in their original form. But how can this apply to persons? They are not the subject of commerce; and, not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to congress to regulate commerce, and the prohibition to the states from imposing a duty on imported goods." (36 U. S. 11 Pet. 136.)

In *Woodruff v. Parham* (8 Wal. 123), which was a case

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where the city of Mobile, Alabama, in accordance with a provision in its charter, authorized the collection of a tax on sales at auction and sales of merchandise, capital employed in business and income within the city. Woodruff and others, as auctioneers, received, in the course of their business for themselves, or as consignees and agents for others, large amounts of goods and merchandise, the product of states other than Alabama, and sold the same in Mobile to purchasers in the original and unbroken packages. When the tax-collector demanded the tax, Woodruff refused to pay it, claiming that it was repugnant to the provisions of the constitution of the United States. The court, after a full consideration and review of previous decisions, held that the term "import," as used in the constitution, did not refer to articles imported from one state into another, but only to articles imported from foreign countries into the United States, and that a uniform tax imposed by a state on all sales made in it, whether they be made by a citizen of it or a citizen of some other state, and whether the goods sold are the produce of the state enacting the law or of some other state, are valid. (*Hinson v. Lott*, 8 Wall. 148; *Waring v. The Mayor*, 8 Wall. 110.)

The act of this state does not contemplate any restriction whatever upon commerce. "The power it asserts," as was said by the supreme court of Indiana, in *Beale v. The State*, "is inseparable from sovereignty essential to its existence, and one which all expounders of the constitution admit to have been reserved." (4 Black, 109.)

To pronounce such a law unconstitutional because it might in some imaginable manner affect the operation of commerce would be to surrender the principle that a state has the right, for its support, to impose a tax upon citizens who are conducting business within its jurisdiction. Such a doctrine is not, in our opinion, sustained by the reasoning of any of the cases cited by counsel. On the other hand, while the facts in many of the cases referred to are different from the case at bar, the reasoning of the courts is decidedly in favor of the views we have expressed.

In *Nathan v. The State of Louisiana*, it was decided that

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tax imposed by a state upon exchange-brokers was not void for repugnance to the constitutional power of congress to regulate commerce.

Justice McLean, in delivering the opinion of the court, says: "The right of a state to tax its own citizens for the prosecution of any particular business or profession within the state has not been doubted. And we find that in every state money or exchange brokers, vendors of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern-keepers, auctioneers, those who practice the learned professions, and every description of property, not exempted by law, are taxed." * * "The taxing power of a state is one of its attributes of sovereignty. And where there has been no compact with the federal government, or cession of jurisdiction for the purposes specified in the constitution, this power reaches all the property and business within the state which are not properly denominated the means of the general government; and, as laid down by this court, it may be exercised at the discretion of the state. The only restraint is found in the responsibility of the members of the legislature to their constituents. If this power of taxation by a state within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce the resources of a state may be thereby essentially impaired. But state power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws; and, also, the numberless enterprises in which its citizens may be engaged. These are subjects of state regulation and state taxation, and there is no federal power under the constitution which can impair this exercise of state sovereignty." (49 U. S. Rep. (8 How.), 82.)

This power of the state in the exercise of its sovereignty has repeatedly been declared by the state courts, and acknowledged by the supreme court of the United States. (*Gibson v. Mason*, 5 Nev. 283; *Raguet v. Wade*, 4 Ohio, 107; *Sears v. Warren*, 36 Ind. 267; *Harrison v. Mayor of Vicksburg*, 3 Smedes & Marshal, 581; *McCullough v. State of Mary-*

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land, 17 U. S. Rep. (4 Wheat.) 428; *City of New York v. Miln*, 36 U. S. Rep. (11 Pet.) 138-9; *License Cases*, 46 U. S. Rep. (5 How.), 625; *Passenger Cases*, 48 U. S. Rep. (7 How.) 402, 531; *Woodruff v. Parham*, 8 Wal. 137; *Ward v. Maryland*, 12 Wal. 428.)

Being unanimously of the opinion that the act is constitutional and valid, we have considered and disposed of the case upon its merits, without reference to the disputed question as to whether this court has jurisdiction of the case under the writ of habeas corpus. Upon this point we express no opinion.

The petitioner is remanded into custody.

[No. 821.]

DAVID ESTEY, RESPONDENT, v. R. A. COOKE, APPELLANT.

LIEN FOR KEEPING ANIMALS, WHEN LOST.—The statutory lien (1 Com. L. 144-6) for keeping animals is lost when the possession is parted with. *Cardinal v. Edwards*, 5 Nev. 36, affirmed.

STATUTE OF FRAUDS—DELIVERY AND ACTUAL CHANGE OF POSSESSION.—The principles decided in *Gray v. Sullivan* (10 Nev. 416), and *Twist v. Kelley* (11 Nev. 382), as to what acts are necessary to constitute an actual change of possession adhered to upon the doctrine of *stare decisis*.

APPEAL from the District Court of the Third Judicial District, Lyon County.

The facts are stated in the opinion.

Drake & Gaston, for Appellant:

I. The transfer of the property, under the circumstances detailed in the evidence, is conclusively fraudulent and void under sections 60, 64 and 69 of the "act concerning conveyances," approved Nov. 5, 161; sec. 288, 292 Comp. L.; *Hulburd v. Bogardus*, 10 Cal. 518; *Richards v. Schroder*, 10 Cal. 431; *Doake v. Brubaker*, 1 Nev. 218; *Sharon v. Shaw*, 2 Nev. 289; *Lawrence v. Burnham*, 4 Nev. 361. The principles are elaborately discussed in *Bump on Fraud. Con.*, citing innumerable cases, 152 to 160, and 173 to 175, and 230 *et seq.*, 477 *et seq.*

Argument for Respondent.

II. There is no evidence showing or tending to show that Dow was a bailee. He himself swears that Estey always had control of the teams; took them out and returned them at will. Dow had no lien upon the teams for stabling; for he never intimated any intention to claim one. He was away from the stable for days at a time, and he made no attempt to exercise control over the teams. The statute does not, of its own force, bestow a lien in favor of a stable-keeper. It was necessary for him to assert his right by words or acts, or both; he did neither. On the contrary, all his declarations establish his intention of disclaimer in respect to a lien. His every act and declaration is inconsistent with an intention to claim a lien on the horses for feed. (Schoaler on Pers. Prop. 494, 497.)

III. Even if Dow had secured a lien prior to the transfer, he waived and abandoned it when he agreed to "look to Estey for his pay." The debt upon which he could have claimed his lien was extinguished, and with the extinguishment of the debt, the lien expired; Eldridge no longer owed Dow. (4 Abb. Pr.; N. Y. Dig., new ed. 42, sec. 21; 2 Bouvier's Dic.; *Cardinal v. Edwards*, 5 Nev. 36, and authorities there cited.)

Kelton & Thomas, for Respondent:

I. When the vendee is in possession of property at the time of sale, there need be no formal delivery of possession. A declaration of sale by the vendor, and a surrender of control is all that can be done, and all that the law requires. (Bump on Fraud. Con. 183, and cases cited thereunder; Comp. L. sec. 146.)

Our statute of fraud requires "immediate delivery and actual and continued change of possession," only where the personal property sold is "in the possession or under the control" of the vendor. (Comp. L. sec. 292.) And if such control or possession is at all qualified, or less than absolute, the delivery must be subject to such qualification. And in this case, both vendor and vendee recognized Dow's lien, and the sale and delivery was made subject thereto, which fact precluded a removal without the commission of a crime.

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Delivery must be subject to the rights of third parties. (Bump on Fraud. Con. secs. 206-7.)

By the Court, BEATTY, J.:

The plaintiff in this case was the vendee of certain personal property which was attached by the defendant, as sheriff of Lyon county, at the suit of a creditor of plaintiff's vendor. The appeal is from a judgment for the value of the property attached, and from an order overruling defendant's motion for a new trial. One of the grounds of the motion for a new trial was that there was no evidence of an actual and continued change of possession of the property in question from the vendor to the vendee; and whether there was sufficient evidence on this point is the only question in the case that presents any difficulty. The question of actual fraud has been somewhat discussed, but as to this point it is only necessary to say that there was a substantial conflict of testimony in regard to the matters from which a fraudulent intent on the part of the plaintiff might have been inferred. Under the circumstances, although there may be some reason to suspect the *bona fides* of the transaction, the finding of the district court that it was not fraudulent in fact, is conclusive.

As to the other point—delivery and actual change of possession—the case was substantially as follows: The property sued for consisted of four or five horses, with their harness, etc., comprising a part of a team belonging to one Eldridge, and driven by the plaintiff as his servant. The team, when not employed, was left in the stable of one Dows at Silver City, and Eldridge was indebted to Dows in the sum of three hundred and sixty dollars, or thereabout, for the stabling and feeding of the animals. Dows was aware of the negotiations between the plaintiff and Eldridge for the purchase and sale of the teams, and it had been agreed between them that in case of a sale, plaintiff should assume and Dows look to him for the indebtedness of Eldridge on account of such stabling and feeding. It was further understood between plaintiff and Dows that the team should be kept at the latter's stable until his bill was

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paid. On the tenth of April, 1876, Eldridge and plaintiff agreed upon the terms of sale, and a bill of sale was executed and delivered about four o'clock in the afternoon. The horses which had been driven by the plaintiff from Empire that morning were in the stable of Dows at the time of the sale, and the parties proceeded to the stable, where, in the presence of witnesses, Eldridge pointed out the property sold, and declared that he delivered it to plaintiff, and that it was his property. This was all that was done in order to effect a delivery or change of the possession. The horses and other property remained where they had been kept for months before, and, to all outward appearance, in exactly the same situation in which they had been before the sale.

As the party were leaving the stable they were met by the sheriff, who told them he had come for the purpose of attaching Eldridge's teams, but, being notified of the sale to the plaintiff, he did not take any of the property into his possession at that time. He garnisheed plaintiff and went away. Afterwards—about nine o'clock the same night—he came back and took away the property which is the subject of this suit.

It is claimed by the appellant that after the sale and before the levy of the attachment—an interval of four or five hours—there was ample time and opportunity for the respondent to have removed the horses to some other place than that in which they had been kept by his vendor, and that he was obliged to effect such removal as soon as he reasonably could, in order to satisfy the requirements of the statute. The respondent, on the other hand, contends that, under any circumstances, it was unnecessary for him to remove the horses to another stable in order to effect a change of possession such as the statute requires; but that, even if it would ordinarily be necessary for the vendee of horses to remove them from the stable where they have been kept by the vendor, in this case he was excused from doing so by reason of the fact that Dows had a lien upon these horses for feeding and stabling them, and consequently they could not be removed without his consent. It would seem from the testimony that Dows had no such lien under

Points decided.

the statute (C. L., secs. 144, 145, 146) as would have prevented plaintiff from removing the teams if he had desired to do so. They were kept in Dows' stable and fed with his grain, but they were apparently in the exclusive possession of Eldridge, by whom they were in constant use hauling wood on contracts with other parties. The lien, under the statute, is lost when the possession is parted with, (*Cardinal v. Edwards*, 5 Nev. 36), and it would seem, has no existence apart from possession in the lien claimant.

But, tested by the principles established in *Gray v. Sullivan* (10 Nev. 416), which was followed in *Twist v. Kelly* (11 Nev. 382), the acts of the plaintiff in this case were sufficient to satisfy the requirements of the statute as to change of possession. It cannot be said consistently with the rule of those cases that he was bound to remove the horses to another stable for the purpose of advertising the public of a change of ownership. I dissented from the opinion of the court in *Gray v. Sullivan*, and still think that a more stringent interpretation of the statute would be a better one; but, however that may be, the rule has been acted upon to an extent that brings it within the protection of the principle of *stare decisis* and, whether right or wrong originally, it would certainly be wrong to depart from it now.

The judgment of the district court is affirmed.

[No. 823.]

W. R. LEE ET AL., APPELLANTS, v. ANGUS McLEOD,
RESPONDENT.

PAROL LICENSE, WHEN IRREVOCABLE.—A parol license to erect a dam upon another's land for the purpose of running a flouring-mill, is irrevocable after the party to whom the license is given has executed it by erecting the mill, or otherwise expending money upon the faith of the license.

IDEM—STATUTE OF FRAUDS.—The expenditure of money in consequence of the license, has the effect of turning such license into an agreement that will be enforced in equity. The execution of the parol license supplies the place of a writing, and takes the case out of the statute of frauds.

PLEADINGS, WHEN OBJECTIONS TO, SHOULD BE MADE IN THE COURT BELOW.—

An objection that evidence tending to establish a parol license ought not

Statement of Facts.

to have been admitted because the facts necessary to create a contract, or constitute an equitable estoppel, were not specially pleaded, will not be considered on appeal unless the objection was properly made in the court below.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

This action was brought by W. R. Lee, James Mills and Jacob Mills, against Angus McLeod, to recover damages for an alleged unlawful diversion of the waters of Walker river, and to enjoin the defendant McLeod from diverting the same to the injury of plaintiffs.

It appears from the testimony that the plaintiff Lee is a miller; that in 1873 he had frequent conversations with the defendant McLeod regarding the advisability of building a flouring-mill; that McLeod frequently asserted that it would be of great advantage to him and to the community, and would be a paying operation, and generally advised and requested plaintiff Lee to build such a mill; that McLeod repeatedly stated that he would give the plaintiff a mill-site anywhere on his land, and would also give the use of the water from Walker river at any place where it run through his land and from certain ditches which he owned. All the people in Mason's valley made the same offer. Plaintiff Lee thereafter selected a mill-site off from the land of defendant, and entered into an agreement with his co-plaintiffs, who were farmers, to construct a ditch and build a dam so as to divert the waters of Walker river to said mill-site, with the understanding that if there was water enough for both, both should have it, otherwise, Lee should take it in the winter and his co-plaintiffs in the summer. The ditch and dam were built, the dam being nearly all on McLeod's land. McLeod gave plaintiffs permission to take the water at the point selected by plaintiffs, and to build a dam that would raise the water eighteen inches, upon condition that a levee of corresponding height should be built. The dam was built so as to raise the water over two feet high; McLeod at first objected to this, but upon the promise being made upon the part of plaintiffs that they would lower the dam, when the water raised, he consented. While the dam was

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being built McLeod frequently passed where the plaintiffs were at work, and never made any objections except as above stated; he authorized plaintiffs to take material from his ranch to make the dam, and frequently gave his assent to what had been done. After the dam was completed and levee built he assured plaintiffs that they had fully complied with his requirements. After the ditch and dam were finished and after the flouring-mill had been erected, McLeod informed plaintiffs that he wished to dig a cut across his own land for the purpose of taking a part of the water above the dam and emptying it into the river below the dam, for the purpose of creating a counter current, saying that it would not deprive plaintiffs of the use of the water; that if it did he would fill it up, as he only wanted a small part of the water. Upon this assurance, one of the plaintiffs helped dig the cut. Afterwards, without the consent of plaintiffs, the cut was made deeper and the plaintiffs were thereby deprived of the water.

This testimony was all admitted without objection. During the trial plaintiffs offered to prove the value and cost of the ditch, dam and flouring-mill constructed by them, with the view of showing to what extent they had complied with their part of the contract with defendant. Defendant objected to this evidence, upon the ground that it was irrelevant and immaterial to the issue. The court sustained the objection, and plaintiffs excepted.

This appeal is taken from the order and judgment of the district court granting a nonsuit.

T. W. IV. Davies, for Appellant:

I. The statute of frauds requires all agreements concerning land to be in writing; but this statute will never in equity be allowed to operate as a protection to fraud, and for the purpose of showing that a fraud has been, or is sought to be committed, parol evidence will be admitted even against the words of the statute.

Where there has been such a part performance of a verbal contract by plaintiffs as to put them into a situation which would operate as a fraud upon them unless the ver-

Argument for Respondent.

bal agreement should be enforced, a specific performance of the contract will be decreed.

The specific performance asked by plaintiffs is to compel defendant to comply with his part of the contract, and permit them to enjoy the right of taking and using the water granted by him to them in the beginning, and to desist from malicious interference with, and destruction of, their vested rights. (*Tohler v. Folsom*, 1 Cal. 207; *Johnson v. Rickett*, 5 Cal. 513; *Arguello v. Edinger*, 10 Cal. 150; *Hidden v. Jordan*, 21 Cal. 92; *Farley v. Vaughn*, 11 Cal. 227.)

II. The defendant, after standing by and seeing plaintiffs perform work, construct the dam and ditch, expend large sums of money in the erection of a mill, offers all manner of assistance in the enterprise of plaintiffs; consults with them about making his "cut-off," promising to close it if it in any wise injured plaintiffs' ditch and water privilege; acquiesces in all the acts of plaintiffs, both tacitly and openly, and then by repudiation of his agreement and acquiescence, seeks to destroy the vested rights of plaintiffs. He is estopped from denying plaintiffs' rights. (Smith's Lead. Cases and authorities cited.)

Ellis & King, for Respondent:

I. The court did not err in excluding the testimony as to the cost of the ditch, dam and mill, because it was offered solely for the purpose of showing how far the plaintiffs had complied with some imaginary contract which is not pleaded.

II. The plaintiffs can only recover in this case upon the theory that they owned a usufructuary right to a portion of the water of Walker river, and that the defendant had deprived them of the enjoyment of such right. To show this, they must show that they had actually appropriated the water rightfully as against the defendant, or that they had contracted with the defendant for the use of the water according to law, and for a sufficient consideration passing to the defendant, from, or on behalf of the plaintiffs.

III. The plaintiffs failed to show any contract by which McLeod parted with a portion of his estate. We maintain that McLeod is a riparian proprietor, and has the rights as

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against the plaintiff to the full flow of the stream; that there was no contract; that there was no consideration to support any contract. (Smith on Con., "Consideration;" that the pretended contract is clearly within the statute of frauds. (Smith on Con. 119, and cases cited; *Stevens v. Stevens*, 11 Met. 251; *Thompson v. Gregory*, 4 John. 81; *Carter v. Harlan*, 6 Md. 20; *Moulton v. Faught*, 41 Me. 298.)

That if there was a contract, it has been violated by the plaintiffs in rising and seeking to maintain a dam three feet high, when by their testimony they only had permission to build it eighteen inches.

If such is the case, McLeod clearly has the right to revoke his license and to defend this action. And the taking of counter steps to protect his own land from overflow, by making the cut as against the raised dam, was legitimate and amounted to a revocation of the license. This was only a license; the expenditure of money makes no difference. (Wash. on Ease. and Serv. Ed. 1873, 5, 6, 24, 26, 27.)

By the Court, HAWLEY, C. J.:

A parol license to erect a dam upon another's land, or to convey water from a stream running through the land of another, for the purpose of erecting and conducting a flouring-mill, is, in our opinion, irrevocable after the party to whom the license is given has executed it by erecting the mill, or otherwise expended his money upon the faith of the license.

This principle is very clearly stated in *Rerick v. Kern* (14 Serg. & Rawle, 267), where the court held that a parol license, given without consideration, to use the water of a stream for a saw-mill, in consequence of which the licensee goes to the expense of erecting a mill, the license cannot be revoked at the pleasure of the licensor, and that the licensee could maintain an action against the licensor for a diversion of the water to his injury. Gibson, J., in delivering the opinion of the court, said: "A license may become an agreement on valuable consideration, as, where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improve-

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ments or invested capital in consequence of it he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived." (2 Am. Lead. Cases, 734.) The principle that expending money or labor in consequence of a license to divert a water-course, or use a water-power, in a particular way, has the effect of turning such a license into an agreement that will be enforced in equity, has been frequently announced by the courts. In all such cases the execution of the parol license supplies the place of a writing, and takes the case out of the statute of frauds. (*Woodbury v. Parshley*, 7 N. H. 237; *Snowden v. Wilas*, 19 Ind. 14; *Stephens v. Benson*, Id. 369; *Lane v. Miller et al.*, 27 Ind. 537; *The Raritan Water Power Co. v. Vegthe*, 21 N. J. Eq., 463; *Rhodes v. Otis*, 33 Ala. 578; *Campbell v. McCoy et al.*, 31 Penn. 264; *Prince v. Case*, 2 Am. Lead. Cases, 760-1; *Ameriscoggin Bridge v. Bragg*, 11 N. H. 108.)

The rule applicable to such cases is also acknowledged in cases where a parol license had been given to erect party walls. (*Wickersham v. Orr*, 9 Iowa, 259; *Russell v. Hubbard et al.*, 59 Ill. 340.)

There are several very respectable authorities which hold a contrary doctrine, but we think the rule as announced in the authorities we have cited is founded in better reason, and fully accords with our views in relation to this subject.

There was some evidence admitted without objection which tended to prove an executed parol license. Respondent claims that the facts necessary to create a contract or constitute an equitable estoppel were not specially pleaded, and that no evidence of this character ought to have been admitted. This objection does not appear to have been made in the court below, and it is therefore unnecessary to decide the question as to the sufficiency of the pleadings. The plaintiffs will, if they so desire, be allowed, upon proper motion, to amend their complaint, so as to avoid any objection of this character upon another trial.

As the testimony in this case tended to prove that plaint-

Points decided.

iffs were induced to build and had erected a flouring-mill, and constructed a ditch, relying upon a parol license given by the defendant and others to erect a dam and divert the waters of the Walker river from the natural channel of said stream, for the purpose of operating said mill, and that defendant had, by digging a deep cut across his own land, diverted the water of said stream away from the plaintiffs' dam, to their injury, it follows that the court erred in granting a nonsuit.

The judgment of the district court is reversed and cause remanded for a new trial.

[No. 812.]

L. I. HOGLE ET AL., RESPONDENTS, v. B. N. LOWE ET AL., APPELLANTS.

PARTNERSHIP IN REAL ESTATE—NOTICE OF COPARTNERSHIP.—Lowe and Griswold were copartners in the business of saloon-keeping, and owned the lot and building they occupied, each holding the legal title to an undivided one-half. Lowe mortgaged his half interest, and upon the foreclosure of this mortgage, Griswold, having purchased the property under an execution sale in a suit brought by certain of the creditors against the copartnership, claimed that the real estate belonged to the copartnership, and was subject to the payment of the copartnership liabilities: *Held*, that the legal title to the property mortgaged having been in Lowe, it was incumbent upon Griswold to prove that such property was in fact a portion of the partnership assets, and that the mortgagees had notice thereof.

IDEM—INSOLVENCY OF COPARTNERSHIP.—If the premises were in fact partnership property, and the mortgagees had notice of such fact, the mortgagees would then be bound to inquire concerning the firm indebtedness.

REAL ESTATE, WHEN PARTNERSHIP PROPERTY.—Real estate purchased with partnership funds for partnership purposes, and appropriated to partnership uses, is, in equity, presumed to be partnership property, and it is, under such circumstances, immaterial whether the legal title is taken in the name of a part or all of the partners.

IDEM.—Individual real property brought into the partnership, by the copartners, at the time of its formation or afterwards, and, by proper agreement of the partners, converted into partnership property and appropriated to its uses, becomes a portion of the capital stock of the firm, and will be treated in equity as personalty, although standing in the name of an individual partner.

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IDEM —Upon a review of the testimony in this case: *Held*, that the court did not err in deciding that Lowe and Griswold held the real estate in question as tenants in common, and not as partners, at the date of the mortgage.

APPEAL from the District Court of the Ninth Judicial District, Elko County.

The facts appear in the opinion of the court.

R. R. Bigelow, for Appellants.

I. The burden of the defense of being a *bona fide* purchaser without notice of equities rests upon the purchaser. There is no presumption in his favor, and he is required to prove affirmatively that he purchased without notice. (*Gallatain v. Erwin*, Hopkins's Ch., 48; *Long v. Dollarhide*, 24 Cal. 227; *Colton v. Seavey*, 22 Cal. 496; *Landers v. Bolton*, 26 Cal. 419; *Lawton v. Gordon*, 34 Cal. 38; *Id.*, 37 Cal. 205; authorities cited in respondents' brief in *Scott v. Umbarger*, 41 Cal. 414.) It is not necessary that a purchaser should have positive knowledge of equities; anything that puts him upon inquiry is sufficient. (*Crosier v. McLaughlin*, 1 Nev. 348; *Lawton v. Gordon*, 37 Cal. 205; *Galland v. Jackman*, 26 Cal. 87; Story's Eq. Juris., sec. 400, 400 b.)

II. But admitting that the mortgagee and the plaintiff in this action had no actual knowledge of Griswold's rights, and no knowledge of anything that should have put them upon inquiry, still they cannot be held to have been innocent purchasers, for the fact that defendant Griswold was in possession of this property from November 22, 1872, up to the commencement of the attachment suit of Badt & Cohn in the fall of 1873, during which time this mortgage was made and purchased by plaintiffs, was constructive notice of his equity, not only to plaintiffs but also to Smith, the mortgagee. (*Duryea v. Burt*, 28 Cal. 587; *Woodson v. McKune*, 17 Cal. 300; Story's Eq. Juris., sec. 395; 8 Cal. 467; 7 Cal. 308.)

III. The real estate was partnership property. If Lowe and Griswold intended it to be partnership property then it had that character. Whether real property shall become partnership stock or not is a question of intention. (Pars.

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on Part., 378; and note L; *Fall River Whaling Co. v. Borden*, 10 Cush. 462; *Dyer v. Clark*, 5 Metc. 562-582.)

The partnership was formed for the very purpose of using this property. The real estate was a part of their capital stock, equally as much so as the fixtures or stock on hand. Their acts, taken in connection with the manner of the formation of the partnership, and the purpose for which it was formed, show that a partnership existed from the first in this property. Their acts must all be considered in determining the intention of the partners as to the tenure by which this property should be held. (*Fall River Co. v. Borden*, 10 Cush. 463.)

IV. The partners have a lien upon all copartnership property for the payment of the firm's debts; and when such property is sold to satisfy such debts, which is the case here, the purchaser takes it relieved of all incumbrance made by an individual partner for the personal debts. (*Jones v. Parsons*, 25 Cal. 102; *Whitmore v. Shiverick*, 3 Nev. 288; *Dupuy v. Leavenworth*, 17 Cal. 264; *Dyer v. Clark*, 5 Metc., 562.)

V. It does not matter in whose name the real estate is held; if it belongs to the partnership it is to be treated as personalty. (Pars. on Part., 377; Coll on Part., 135; 9 Cal. 616; 10 Cush. 462.)

The general rule is that real estate, in order to become firm property, must be purchased with partnership funds for partnership purposes, but *Duryea v. Burt* (28 Cal. 583), decides that there is no difference between property obtained that way and property brought into the copartnership by the partners, at the time of its formation, and there is certainly none in principle.

W. C. Van Fleet, for Respondent;

I. The record showed an undivided half interest standing in the name of Lowe, and the transaction of Lowe and Griswold was not of a character to put either Smith, the mortgagee, or his assignees, Hogle and Gillett, upon inquiry as to any latent claim by Griswold. The case is distinct from any cited by appellant's counsel. Griswold held himself

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out to the world by his own action as merely the tenant in common of Lowe, and is now estopped from claiming any equity as against either the mortgagee or his assigns.

II. In order to make real estate, standing in the name of individual members of a firm, partnership property, and charge it with trust in favor of partnership liabilities as against innocent purchasers, three indispensable conditions are necessary, to wit: First, that it must have been purchased with partnership funds; Second, for partnership purposes; and, Third, be appropriated for partnership uses. This rule is recognized by all the authorities cited by appellant.

The case of *Duryea v. Burt*, grew out of that anomalous relationship, a mining partnership, and is governed by peculiar and special rules; rules for the greater part that have been called into being for the protection of that large element engaged in mining for the precious metals on this coast.

The real estate of a partnership must be purchased with partnership funds to make it partnership property. (*Pugh v. Currie*, 5 Ala. 446; *Owens v. Collins*, 23 Ala. 837; *Matlock v. Matlock*, 5 Ind. 403; *Patterson v. Blake*, 12 Ind. 436.) If there is no proof that it is purchased with partnership funds, it will be presumed to be held by the parties as tenants in common or joint tenants. (*Thompson v. Bowman*, 6 Wal. 316.)

If not paid for by partnership funds then it is his property who pays for it, whatever use he permits to be made of it. (*Marvin v. Trumbull*, Wright. 386; *Wheatley v. Calhoun*, 12 Leigh. 264; *Owens v. Collins*, 23 Ala. 837; 4 Mumf. R. 316; 7 S. & R. 438.) In this case the property never was purchased with partnership funds or for partnership purposes. Lowe merely transferred an interest in it to Griswold, which created as to third persons, if not between the parties, only a tenancy in common; and Lowe lost no right or authority to convey away or dispose of his remaining interest in any manner he saw fit.

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By the Court, LEONARD, J.:

Plaintiffs brought this action to foreclose a certain mortgage, set out in their complaint herein, given by defendant Lowe to one N. D. Smith, upon an undivided one-half interest in lot 7, in block E, in the town of Wells, Elko county, and by Smith transferred to plaintiff, for a valuable consideration. Lowe made default, but defendant Griswold answered and defended, upon the ground that, at the time the mortgage was made, the premises described therein were the copartnership property of the firm of Lowe & Griswold, of which firm defendant Lowe was a member; that said mortgage was given to secure a private debt of defendant Lowe; that at the time it was given, the firm was insolvent, and that afterwards the property was sold to satisfy debts owing to firm creditors, by the sheriff of Elko county; that Smith and plaintiff had notice of the fact that the property mortgaged by Lowe was partnership property of the firm. Defendant Griswold claimed the property through certain conveyances from the sheriff and his grantee. The cause was tried by the court without a jury, and the following facts and conclusions of law were found: That on the twenty-sixth day of November, 1872, defendant Lowe was the owner and in possession of lot 7, in block E, in the town of Wells, in Elko county, with the improvements thereon; that on the same day Lowe and Griswold entered into a copartnership for the purpose of carrying on the business of saloon-keeping in said town, and in a certain building situated on the premises; that on said day Lowe conveyed by deed to Griswold an undivided one-half interest in said lot and improvements, which deed was duly recorded in the office of the county recorder of Elko county, September 17, 1873; that defendants continued to occupy the premises until some time in October, 1873; made some improvements thereon, but how much or at what time does not appear; that the defendants bought in an outstanding title against the premises, but at what time, or how much was paid for the same is not shown; that on the twenty-first day of April, 1873, defendant Lowe executed and delivered to one N. D.

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Smith, for a valuable consideration, the note and mortgage described in the complaint; that on the second day of May, 1873, for a valuable consideration, Smith sold and assigned the same to plaintiffs; that the mortgage was duly recorded in the office of the county recorder of Elko county, May 3, 1873; that on the twenty-first of April, 1873, the firm of Lowe & Griswold was indebted to the firm of Badt & Cohn in the sum of eight hundred and sixty-six dollars and fifty cents and were insolvent, but that neither Smith nor plaintiffs had notice of such insolvency; that on the fifteenth day of September, 1873, the firm of Badt & Cohn commenced an action in the same court to recover of Lowe & Griswold the sum of one thousand and thirteen dollars and eighty-nine cents, partnership liabilities of Lowe & Griswold, and on October 3, 1873, obtained judgment for the full amount sued for, besides costs; that execution was duly issued upon said judgment, and the premises in dispute were sold by the sheriff of Elko county to Gabriel Cohn, one of the plaintiffs in said action; that thereafter a deed was duly executed and delivered by the sheriff, conveying said premises to Cohn, who, prior to the commencement of this action, conveyed the same to defendant Griswold; that plaintiffs in this action had no notice that the property in dispute was claimed as copartnership property of defendants. As conclusions of law, from the foregoing facts, the court found that the defendants, Lowe and Griswold, were not partners in the ownership of the premises, but were tenants in common in the whole lot and improvements thereon; that plaintiffs were entitled to a decree of foreclosure against both defendants, and to other relief usual in such cases. Decree was entered accordingly.

Defendant Griswold appeals from the decree and the order overruling his motion for a new trial.

There are several assignments of error, one of which only, as we regard the case, requires our examination, viz.: Did the court err in finding that defendants were not partners in the premises mentioned, but were tenants in common therein?

The fact found by the court, that neither Smith nor

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plaintiffs had notice of the insolvency of Lowe & Griswold, even though it is incorrect, is harmless, for the reason that it was not material whether they had notice of the existence of the copartnership indebtedness or not. Plaintiffs were bound to inquire concerning the firm indebtedness, if the premises were partnership property, and they had knowledge that it was so held, or take the consequences of their own laches. (*Hoxie v. Carr*, 1 Sumner, 192.) The legal title to the property mortgaged having been in Lowe, it was incumbent upon defendant Griswold to prove that such property was in fact a portion of the partnership assets, and that plaintiffs had notice thereof. He was not obliged to prove that plaintiffs had knowledge of the insolvency of Lowe & Griswold. The several assignments that the court erred in failing to find certain alleged facts cannot be considered here, for the reason that the court was not requested to find the same, and an exception taken to its refusal. (*State v. Manhattan Co.*, 4 Nev. 318; *Warren v. Quill*, 9 Nev. 259.)

There is but little evidence upon the question whether the defendants, at the time the mortgage was given, were partners in the premises in question or tenants in common only. The legal title to an undivided one-half interest was in each, as tenants in common. Defendant Griswold testified as follows:

“About the twenty-second day of November, 1872, the defendant Lowe and myself formed a copartnership for carrying on the saloon business in the town of Wells, in this county. Lowe was then in the saloon business, carrying it on in the building upon which this mortgage was given. I bought an undivided one-half interest in the business, which included the premises upon which the mortgage was given, with the fixtures, stock on hand and everything appertaining to the business. We were to be equal partners, under the firm name of Lowe & Griswold, and I took a deed from Lowe for one-half of the premises, which deed was filed and recorded, at request of E. H. Griswold, September 17, 1873, * * * in Liber 5 of deeds, by F. A. Rogers, recorder.”

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Witness then introduced in evidence a deed from Lowe to him, dated November 26, 1872, conveying an undivided one-half interest in the said property, including the buildings and appurtenances. He then continued as follows:

“That deed was taken by me in pursuance of our agreement to become copartners. I took charge of the saloon immediately, and carried on the business; I had exclusive charge of it for about five months after we commenced business together, as Lowe was away; we conducted the business under the firm name of Lowe & Griswold, and continued to do business in the same way and in the same place until we were attached, at the suit of Badt & Cohn, in September, 1873; during that time we made some repairs upon the building that were paid for by the firm; we built an ice-house on the lot, and that was paid for by the firm; all the expenses of the business and of keeping the premises in repair, making new buildings, etc., were borne by the firm and were done in its name; when I bought in, Lowe had nothing but a possessory right to the lot, and we afterwards bought it from the railroad company; it was paid for by the firm; we got an insurance upon the building in the name of the firm, and it was paid for by the firm; the only way in which we ever used the building was for keeping a saloon in it; the firm bought a billiard table and put it in; this was paid for in part by the firm and part was collected in the suit of Badt & Cohn; everything was done in the name of the firm and by the firm; I know that N. D. Smith had notice that the premises were the copartnership property of the firm, as he was present when Lowe and I made the agreement to go into business together, and heard it all; this agreement was that I should buy one-half of the business, including the buildings, and we would go in as equal partners in it; the capital stock of the firm consisted of the premises in controversy, the fixtures and stock on hand; at the time this mortgage was given by Lowe, on the twenty-first day of April, 1873, he was indebted to the firm in the sum of five hundred dollars or over; we were then indebted to Badt & Cohn in something over nine hundred dollars.”

It was here admitted that at the date of the mortgage,

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the firm of Lowe & Griswold was insolvent and so continued until dissolution.

Witness resumed: "I think plaintiff, Gillett, must have known that I was a partner in this property, as he lived in the same place all the time and was about the saloon frequently after I bought in; the Wells is not a large town; I was in possession of the property from the time I bought in until we were attached by Badt & Cohn."

On cross-examination, witness Griswold said: "We (Lowe and myself) were only partners in the saloon business; we were not partners in a real estate business any further than the real estate in dispute; we did not buy and sell real estate; I think Gillett must have known I was a partner in the premises, as he was around there frequently during the whole winter; there was no special agreement between myself and Lowe that the real estate should be partnership property."

C. E. Gillett testified on behalf of plaintiffs as follows: "I am one of the plaintiffs in this action; I paid N. D. Smith the full face of the note sued on in this action; I paid it in lumber; I did the business of Hogle & Gillett at the Wells; Mr. Hogle was there only occasionally—once or twice during the winter of 1872 and 1873; I had no knowledge that Griswold was a copartner in the premises in dispute when I bought the note and mortgage; I had no positive knowledge that he had any interest in the property, but supposed he had bought one-half of it."

On cross-examination, he said: "I had no positive knowledge that Lowe and Griswold were copartners in the lot and building upon which the mortgage was given when I bought it. I knew they were partners in the saloon business; and knew they were in this building; I made no inquiry to ascertain what Griswold claimed there; I knew that some one owned one-half of the building and lot with Lowe; I made no inquiry as to who it was that owned it, nor what rights they claimed; I knew that Griswold was in possession of the building the winter before I bought this mortgage, and at the time."

The above is all the testimony that in any manner affects

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the question under discussion. It is claimed by respondents that before real estate standing in the names of individual partners as tenants in common can be declared partnership property, and be treated as such by a court of equity, it must appear that it was purchased with partnership funds, for partnership purposes, and appropriated to partnership uses. On the contrary, appellant contends that property brought into a partnership by the partners individually, for the purposes of the partnership, and appropriated to partnership uses, becomes a portion of the common stock, although it be real property and the legal title is in the several partners as tenants in common.

It is well settled by authority that real estate, purchased with partnership funds for partnership purposes, and appropriated to partnership uses is, in equity, presumed to be partnership property; and that, under such circumstances, it matters not if the legal title is taken or held in the name of a part or all of the partners as tenants in common. Upon proof of these facts of purchase and appropriation, unless the presumption arising therefrom be rebutted, equity will treat the property as partnership stock. (Story on Part. 153, and cases there cited; *Duryea v. Burt*, 28 Cal. 580.)

We think it equally well settled that individual real property brought into the partnership by the partners at the time of its formation or afterwards, and, by proper agreement of the partners, converted into partnership property and appropriated to its uses, becomes a portion of the capital stock of the firm, and will be treated in equity as personalty, although standing in the name of an individual partner. (Lindley on Part., 450; Pars. on Part., 366; Story on Part., secs. 15, 16c, 98, 371, 372, 373, and p. 158; Cow. on Part., 254-5; Bissett on Part., 33, 36; *Hoxie v. Carr*, 1 Sumner, 180; *Duryea v. Burt*, 28 Cal. 588; *Sigourney v. Munn*, 7 Conn. 11; *Frink v. Branch*, 16 Conn. 269; *Markham v. Merrell*, 7 How. (Miss.), 444; 1 Am. Lead. Cas. 496.)

But, although the propositions of law just stated be considered settled, still the difficulty remains as to the evidence and extent of Lowe and Griswold's intentions and agreements concerning the tenure of the property in question.

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When property is purchased with partnership funds for partnership purposes, and appropriated to partnership uses, no further proofs should be, and certainly none are, required in order to establish the evident intention and agreement of the partners. In such case, every act impresses upon the property the character of personalty. But the mere fact that real property held by members of the firm as tenants in common is used by the partners in the partnership business for partnership purposes, or an agreement to so use it, is not of itself sufficient to convert it into partnership stock; there must be some evidence of further agreement to make it partnership property. (Vol. 1, Am. Lead. Cas., 496.) At law, real property used by a partnership is deemed to belong to the person in whose name the title by conveyance stands; and it is so considered in equity, until it is shown to be partnership property, either by evidence establishing a proper agreement, or by proof of purchase with partnership funds for partnership purposes.

In *Sigourney v. Munn*, *supra*, the court say: "The case of *Coles v. Coles*, 15 Johns. 159, hardly falls within this case, and certainly does not extend beyond it. The partners, Steven and Willet Coles, sold and conveyed two lots of land for nine thousand dollars, which sum was paid by the purchaser to the defendant. To recover this sum, the administrator of Steven brought an action against Willet, for money had and received. A partnership had existed between the intestate and the defendant in relation to the business of a still house situate on the above lots of land; but it does not appear that the land or house was bought with partnership property, or that they were any part of the company's fund. A verdict was rendered in favor of the plaintiff, under the judge's direction, for a moiety of the sum received by the defendant, on the ground that the intestate was entitled to only half of the land, the partners being joint owners or tenants in common of it. Now, on these facts, that they were mere tenants in common and not partners in the land is too clear to be questioned." In the same opinion (p. 20) the court say: "There remains a third class of cases, which I will now consider, and that is when partners in their copart-

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nership articles, or at the time of a purchase, agree that real estate advanced as stock or acquired with partnership funds shall form a part of the company's property. It was decided by Lord Thurlow (in *Thornton v. Dixon*,) that a copartnership agreement might alter the nature of real property if it were express, and thereby make it partnership fund, (11 Ves. 665-6-7; 7 Ves. 425,) and in two cases which came before the late learned master of the rolls, Sir William Grant, he acted upon the above decision and considered it to conclude the question. (*Bell v. Phyn*, 7 Ves. 453b; *Balmain v. Shore*, 9 Ves. 500.) In the case cited from 7 Serg. & Rawle, 438, Ch. J. Tilghman observed that by positive agreement as between the partners and their heirs and representatives, the character of real estate may be changed; that it may be brought into stock and considered as personal property. I think there exists no reasonable doubt that the land in question, put into the company stock in part, and partly bought for partnership purposes with partnership funds, and the whole being under an express agreement, that it should be partnership property, must in equity be considered and treated in this light." In *Frink v. Branch*, (16 Conn. 269,) *supra*, the court use this language: "We supposed our law, so far as it is necessary for me to look into it in the present case, was settled by this court in the case of *Sigourney v. Munn*, (7 Conn. 11.) The doctrine of that case is, if real estate be acquired with partnership funds for partnership purposes, or was originally put into the company as stock by agreement, then it will be considered as partnership stock."

See also: *Jarvis v. Brooks*, 27 N. H. 66; *Craig v. Leslie*, 3 Wheat. 563; *Wheatley's Heirs v. Calhoun*, 12 Leigh, 273. In *Heirs of Ludlow v. Cooper's Devisees* (4 Ohio Stat. 8) the court say: "It is very clear that although the land was not purchased with partnership funds, but was to be purchased with the separate funds of Cooper and Ludlow, in equal portions, the property was to be so considered and treated; that it was, by agreement, to be sold and converted into money, and each partner to share alike in the profits and, of course, to share in the losses. It is the very case put in

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Story, above cited, in which he says, in substance, that such real estate will, to all intents and purposes, be deemed personal property if the parties themselves have, by their agreement, impressed upon it the character of personalty."

In *Duryea v. Burt* (*supra*) Sawyer, J., says: "It may be that the claims before owned and purchased in severalty, in undivided interests, were held by them throughout their connection as tenants in common. Whether they were or were not is not distinctly found as a fact, and we should not be justified in determining the question from the facts found. Those interests were, doubtless, originally purchased as tenancies in common; but whether from the evidence before the court, and in the manner in which the parties blended their interests in those claims with their subsequent purchases, and in working the whole, the court would be justified in finding that they put in the claims originally held, with the new purchases as partnership property, it is not our province now to determine. That will be a fact to be determined on the new trial. If so, it became partnership property and subject to all the incidents of such property. If not, and it was originally held, and still continues to be held, as a tenancy in common, then it was not partnership property, and the plaintiff has no claim to have the sum due him from his co-tenant or copartner in other matters charged upon it."

And, finally, in *McDermot v. Laurence* (7 Serg. & Rawle, 443), the court say: "But, certainly, where it is the intention of partners to bring real property into the common stock, it would be prudent to put their agreement on record, in order that purchasers may not be deceived. There is no decision which goes so far as to affect a mortgagee circumstanced like the plaintiff in this suit. Even Lord Eldon has not considered the property as personal, unless it was made so by the agreement of the parties or purchased with their funds."

Applying the principles established by the above cases to the findings of fact and conclusions of law considered in the light of the proofs in this case, we are of the opinion that the court did not err in deciding that defendants held the

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property in question as tenants in common, and not as partners, at the date of the mortgage. It is true that defendant Griswold testified that he and Lowe held the property in partnership, and that it was a portion of the capital stock of the firm. But it is evident that such were his conclusions from other facts, not that there was ever any agreement or positive understanding that it should be so; for, upon his cross-examination, he stated definitely, that "there was no special agreement between myself and Lowe that the real estate should be partnership property." We have no doubt that Griswold regarded the premises as partnership property; but, from the fact that Lowe mortgaged his undivided one-half, there is equal reason to presume that he thought otherwise. Without proof to that effect, we certainly cannot suppose he mortgaged property for an individual debt, which, in law, he had no right to so incumber. There is no proof that Lowe ever recognized Griswold as partner in the house and lot, unless by his acts in making improvements, purchasing an outstanding title, insuring the property, etc.; and as to them, they were as consistent with the idea of a tenure of the property as tenants in common, as partners. Being equal owners in it, they were equally interested in making improvements upon it, perfecting their title to it, and guarding themselves against loss by fire. Had the property been purchased with partnership funds, or had it, by a definite, proper agreement, been converted into partnership property, then the acts of defendants, as above stated, would have been additional proof of such conversion.

Should we admit that an understanding or agreement of partners, sufficient to convert real property not purchased with partnership funds, and standing in the names of individual members as tenants in common, into partnership stock, can be shown to have been made by the mere acts and conduct of the partners (which question we do not decide), it would still be true, in this case, that there is not sufficient evidence of such conversion.

Under all the facts and circumstances of the case, we do not feel justified in disturbing the findings and conclusions

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of the court below as to the tenure of the property in question; and having arrived at this conclusion, it is not necessary to consider the question of notice.

The order and decree of the court below are affirmed



[No. 849.]

THE STATE OF NEVADA, RESPONDENT, v. ROBERT H. CROZIER, APPELLANT.

JURY LAW OF 1875—REPEALING CLAUSE IN AN UNCONSTITUTIONAL STATUTE.—

The principle decided in *State v. McClear* (11 Nev. 39), that the effect of declaring certain parts of the jury law of 1875 unconstitutional and void is to leave in full force the sections of the law of 1861, which the act of 1875 attempted to repeal, affirmed.

IDEM.—When any part of a statute is declared unconstitutional, such part is to be regarded as having never, at any time, been possessed of any legal force.

HOMICIDE NOT JUSTIFIED BY PROVOCATION.—The court instructed the jury that: "No provocation can justify or excuse homicide; but may reduce the offense to manslaughter. Words or actions, or gestures, however grievous or provoking, unaccompanied by an assault, will not justify or excuse murder; and when a deadly weapon is used the provocation must be great to make the crime less than murder:" *Held*, not erroneous. (*State v. Raymond*, 11 Nev. 98, affirmed.)

SUFFICIENCY OF INDICTMENT FOR MURDER.—The decision in *State v. Huff*, *ante*, to the effect that an indictment for murder drawn in the approved form of the common law is sufficient to sustain a verdict for murder in the first degree, without the use of the words deliberately and premeditatedly, affirmed.

INSUFFICIENCY OF EVIDENCE.—A verdict in a criminal case will not be reversed where there is any evidence to support it.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

Defendant was indicted, in Elko county, for the murder of Charles Silverstein *alias* Montana Charley.

The indictment, after the caption, reads as follows: "The defendant Robert H. Crozier, above-named, is accused by the grand jury of the county of Elko, state of Nevada, of the crime of murder committed as follows, to wit: That the said Robert H. Crozier on the sixteenth day of January, A.D. 1870, or thereabouts, at the town of Elko,

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in the county of Elko, state of Nevada, in and upon one Charles Silverstein *alias* "Montana Charley," unlawfully, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Robert H. Crozier, with a certain pistol, then and there charged with gunpowder and divers leaden bullets, which said pistol, he, the said Robert H. Crozier, in his hands then and there had and held, at and against the said Charles Silverstein *alias* 'Montana Charley,' then and there unlawfully, feloniously, wilfully and of his malice aforethought, did shoot off and discharge; and that the said Robert H. Crozier, with the leaden bullets aforesaid, by means of shooting off and discharging the said pistol so loaded, to, at and against the said Charles Silverstein *alias* 'Montana Charley,' as aforesaid, did then and there unlawfully, feloniously, wilfully and of his malice aforethought, strike, penetrate and wound the said Charles Silverstein *alias* 'Montana Charley,' giving him, the said Charles Silverstein *alias* 'Montana Charley,' then and there with the leaden bullets aforesaid, by means of shooting off, and discharging the said pistol, to, at and against the said Charles Silverstein *alias* 'Montana Charley,' and by such striking, penetrating and wounding the said Charles Silverstein *alias* 'Montana Charley,' as aforesaid, one mortal wound in and upon the arms, side, ribs, lungs and heart of him, the said Charles Silverstein *alias* 'Montana Charley,' of which said mortal wound, the said Charles Silverstein *alias* 'Montana Charley,' did then and there die. All of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nevada."

A change of venue was granted to Humboldt county, where the case was tried.

The homicide was committed in Bernard's saloon in Elko about eleven o'clock P.M. on the sixteenth of January, A.D. 1877. From the testimony it appears that the defendant Crozier, accompanied by some women of ill repute, visited the saloon, and during the evening engaged in angry conversation with one of the women. During the conversation Silverstein, the deceased, who was quietly sitting by the

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stove, rose from his seat, and Crozier asked him what he was getting up for. Silverstein replied that it was none of his business; that he had said enough to the woman, and if it was not for his gray hairs, he would have interfered. Crozier replied: "That's all right!" Studied a few minutes, and said: "I guess I will take a drink;" got up, went behind the bar, washed a glass and took a drink. While he was behind the bar, the woman with whom he had been quarreling, cried out: "Look out, he is heeled! he has a gun?" She mentioned no name, but her remarks were addressed to Silverstein, and by her intended to warn him of his approaching danger. Silverstein, as some of the witnesses testified, replied: "I might be heeled some time myself, and might give him the same game." Crozier then fired his pistol, and shot Silverstein. He immediately advanced, and Silverstein commenced retreating, and begged Crozier not to fire again: "For God's sake, don't shoot me any more; you have killed me already." Silverstein jumped behind one of the witnesses in order to protect himself from further shots. Crozier advanced, caught hold of the witness, and pulled him around (Silverstein still begging not to be shot again), and succeeded in getting the witness out of the way, and fired the second shot. Silverstein fell, and died within an hour. Deceased had no weapons.

The defendant testified as a witness on his own behalf that when he heard the words: "Look out, he has a pistol," he looked up and saw Silverstein with his hands in his pockets, and supposing that Silverstein was drawing a pistol, he immediately reached down, grabbed a pistol that was lying on a shelf under the counter, raised it above the counter and fired at Silverstein. He further testified that the second shot was accidental.

Defendant having been convicted of murder in the first degree, moved the district court for a new trial upon the grounds: "First. That the verdict is contrary to the evidence and the law; Second. That the court has misdirected the jury in matters of law."

This motion was overruled by the court. This appeal is taken from the judgment and order overruling his motion for a new trial.

Argument for Appellant.

T. W. W. Davies, for Appellant:

I. The defendant was not tried by a jury. As disclosed by the record, the plaintiff was permitted to peremptorily challenge a number of persons who had been called to act as jurors, and had been passed for cause. Section 335, criminal practice act, is no longer in force, having been repealed by act of March 2, 1875. (Sec. 10, p. 119, Stat. 1875.) Certain portions of the act of 1875 have been declared unconstitutional, but it is not in the power of the judiciary to restore or re-enact a repealed law. It was error to allow peremptory challenges, and it is impossible to say what bearing such action had on the verdict in this cause. Unless the persons composing the so-called jury were obtained in the way provided by law, such a body would not be a jury, no matter if it was made up of good and true men, and a trial before such persons would not be, in any sense, a trial by jury. (*People v. Ybarra*, 17 Cal. 171; *People v. Williams*, 18 Cal. 194.) If any error intervenes in the proceedings, it is presumed to be injurious to the prisoner, and generally he is entitled to a reversal of the judgment, for it is his constitutional privilege to stand upon his strict legal rights, and to be tried according to law. (*State v. Parsons*, 7 Nev. 57.) The true rule is, when error intervenes on the trial of a criminal cause, it is presumed to be to the injury of the defendant, unless it is shown by the state that no injury thereby could possibly have resulted.

II. The verdict is wholly unsupported by the evidence.

III. The court erred in giving the first instruction asked by the plaintiff, as follows: "No provocation can justify or excuse a homicide, but may reduce it to manslaughter." "Provocation" means *cause, inducement, calling forth*, and in the connection in which it is used, it is equivalent to saying to the jury that: "No cause is sufficient to justify or excuse a homicide." The court doubtless intended to say that no provocation of mere words was sufficient to justify or excuse a homicide.

IV. The court also erred in instructing the jury concerning murder in the first degree, it not being charged against

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the defendant in the indictment, and no higher crime being charged than murder in the second degree. To constitute murder in the first degree, the killing must be done with deliberate premeditation. Our statute requires the offense to be fully charged. It cannot be said that murder in the first degree is fully charged, or charged at all, when the essential element to constitute that crime, deliberate premeditation, is entirely omitted in the indictment. The statute in this case provides higher punishment for murder in the first degree than in the second, and therefore this added element must be charged in the indictment, else the indictment charges only what merits the lower punishment. No court in this state is warranted in condemning a man to be hung upon an indictment wherein the special element making the killing murder in the first degree is not charged. (Bishop Stat. Cr., sec. 368 *et seq.* and also sec. 465 *et seq.*; 2 Bishop Cr. Proc'd., sec. 562-98; 1 Bishop Cr. Law, sec. 600-797; *State v. McCormick*, 27 Iowa, 402, and cases cited; *Bryan v. State*, 45 Ala. 86.)

John R. Kittrell, Attorney-General, for Respondent, orally argued the case before the supreme court.

By the Court, HAWLEY, C. J.:

Appellant was convicted of murder in the first degree.

1. It is claimed that section 335 of the criminal practice act, which allows peremptory challenges to be interposed in criminal cases, was repealed by the act of March 2, 1875, and it is therefore argued that the court erred in allowing peremptory challenges to be taken by the state. This position is wholly untenable. It was distinctly announced in *The State v. McClear* (11 Nev. 39), that the effect of declaring the act of March 2, 1875, void, in so far as it provided a mode of impaneling a jury, was to leave in full force the sections of the law of 1861 which the act of 1875 attempted to repeal.

It is true there are some authorities which hold that, where the repealing clause in an unconstitutional statute repeals all inconsistent acts, the repealing clause is to stand

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and have effect, notwithstanding the invalidity of the rest. But the great weight of authority is “that such repealing clause is to be understood as designed to repeal all conflicting provisions, in order that those of the new statute can have effect; and that, if the statute is invalid, nothing can conflict with it, and therefore nothing is repealed.” (Cooley’s Const. Lim. 186, and authorities cited in Note 2.)

When any part of a statute is declared unconstitutional, such part is to be regarded as having never, at any time, been possessed of any legal force.

We again repeat, that as that part of the act of 1875 providing a mode for impaneling a jury was declared unconstitutional in the *State v. McClear*, the effect of that decision was to leave in full force all prior existing laws regulating the mode of impaneling juries which said act attempted to repeal.

2. The first instruction of the court, that “No provocation can justify or excuse homicide, but may reduce the offense to manslaughter,” etc., is copied from *State v. Raymond* (11 Nev. 98), and was there held to be correct.

3. The point urged by counsel that the defendant could not be found guilty of murder in the first degree because the indictment does not contain the words “deliberately and premeditatedly,” in addition to the words “unlawfully, feloniously, willfully and of his malice aforethought,” was carefully considered and fully answered in *State v. Huff*, recently decided by this court, and the opinion in that case renders it unnecessary for us to again review the authorities. The indictment in this case is drawn in the approved form of the common law, and we have always held such indictments to be sufficient. (*State v. Raymond*, 11 Nev. 98; *State v. Larkin*, 11 Nev. 314.)

4. The testimony in this case, in our judgment, fully warrants the verdict found by the jury. We have repeatedly declared that a verdict in a criminal case will not be reversed where there is any evidence to support it.

The appeal in this case is utterly devoid of merit.

The judgment and order overruling defendant’s motion for a new trial are affirmed, and the district court is directed to fix a day for carrying its sentence into execution.

Argument for Appellants.

[No. 833.]

FERRARIS LUIGI, RESPONDENT, v. BIAGGIO LUCHESI,
DEFENDANT. FRED. BARNES, W. H. CLARK, AND
MAX OBERFELDER, GARNISHEES AND APPELLANTS.

AUTHORITY OF TRUSTEES TO SELL PROPERTY.—In construing an agreement, executed by an insolvent debtor and his creditors, appointing trustees to manage his property for the mutual benefit of all his creditors; the creditors agreeing to take a certain percentage of their demands; and if the percentage is paid, that the property shall be returned to the debtor; “otherwise, said property to be sold for the benefit of all parties creditors hereto, and divided *pro rata* between said creditors:” *Held*, that the authority to sell the property was clearly given to the trustees.

IDEM—LIABILITY OF TRUSTEES.—Where it is admitted that a sale of property by the trustees of the creditors of an insolvent debtor is honestly made and fairly conducted, and there is no evidence tending to show that the property was sold for any less than its full value, the trustees can only be held for what they actually received.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion of the court.

G. W. Baker, for Appellants:

I. When the language employed in a written instrument is plain and unambiguous, it must be interpreted according to its grammatical sense. It was the plain duty of the trustees, upon default being made on the part of McLeod to make the payments as therein stated, to sell the property.

II. The plaintiffs having succeeded to the rights of Biaggio Luchesi, were entitled to receive just what Biaggio Luchesi could have received, and no more. The effect of the garnishment upon them operated simply to change the payment of the *pro rata* from Biaggio Luchesi to the sheriff or the attaching creditor. When the property was sold and the amount coming to Luchesi was ascertained, the appellants were liable to plaintiff for the amount they received, two hundred and forty dollars, and no more, and this amount they tendered to him, and he declined to accept it.

III. We maintain, that when a garnishee denies or disputes the indebtedness, he is entitled to have the matter at issue submitted to a jury.

Crittenden Thornton, for Respondent:

I. The answer of the appellants did not constitute “a denial of the debt within the language of the statute. (Prac. Act, sec. 246; 1 Comp. Laws, sec. 1308.) Such a denial must be a denial in good faith, and not the opinion of the garnishees on the question of their own liability. (*Parker v. Page*, 38 Cal. 522.)

II. The first section of the “act to protect the wages of labor” (1 Comp. p. 51, sec. 141), gives the laborer a right or lien prior to any assignment for the benefit of creditors. The respondent in this case is within the protection of both the first and third sections. His right is superior to any conveyance by way of assignment, or any lien by attachment. His lien constituted a prior right to satisfaction out of the estate of McLeod superior to any right of his to assign, or of his general creditors, to receive his assets.

III. The agreement shows that the creditors of McLeod and McLeod himself placed the estate in the hands of the appellants upon a certain and specified trust, to sell the same for an amount not less than forty cents on the dollar of their aggregate claims, which sum was to be paid in certain specified fractions. In case this sum could not be had, the property was to be sold, and the proceeds divided. The power thus conferred upon the assignees was limited and special. They did not sell the property to any one for an amount equal to forty cents on the dollar.

IV. The assignees sold the property to Max Oberfelder, one of themselves, and another person, in disregard of their duties as the agents and trustees of the creditors, for a sum alleged to be equal to twenty per cent. of the claims. Trustees who are required or empowered to fulfill a specific duty, cannot buy the trust estate, or sell it to themselves. (*Wilbur v. Lynde*, 49 Cal. 292; *Andrews v. Pratt*, 44 Id. 309; *San Diego v. S. D. & L. A. R. R.*, 44 Id. 112.)

By the Court, HAWLEY, C. J.:

On the fourteenth day of January, 1876, the creditors of one Neil McLeod, among whom was the defendant Luchesi,

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whose claim was one thousand two hundred dollars, and appellants Barnes, Clark and Oberfelder executed the following agreement:

“Witnesseth: That whereas, the said Neil McLeod has sold and transferred to us, in satisfaction of his indebtedness to us, all of his property, both real and personal, in the counties of Eureka and White Pine, state of Nevada; now, therefore, in consideration of the premises, it is mutually agreed between us to place said property in charge of Max Oberfelder, Fred. Barnes, W. H. Clark and H. Crowell, as our agents to manage the same for our mutual benefit; and we further agree to receive forty cents upon the dollar for each of our debts, respectively, to be paid as follows: one third to be paid six months from date, one third nine months from date and one third twelve months from date; and it is mutually agreed that, upon the payment being made as aforesaid, said property shall be returned to said McLeod; otherwise said property to be sold for the benefit of all parties, creditors hereto and divided *pro rata* between said creditors.”

After the execution of this agreement the creditors of Luchesi brought suit and obtained judgment; and the appellants were regularly served with notice of garnishment. Certain proceedings were thereafter instituted in the district court, under the provisions of the “act to protect the wages of labor” (1 Comp. L. 141-143), and the plaintiff Luigi was therein declared to have a preferred lien, as against the other creditors of Luchesi, for four hundred dollars.

Subsequently the plaintiff Luigi obtained an order of court requiring the garnishees to appear and show cause why judgment should not be entered against them in favor of the plaintiff for the four hundred dollars and costs.

In obedience to this order the garnishees appeared and made answer by affidavit, showing, among other things, that they and one Hiram Crowell were appointed by the creditors of McLeod, trustees and agents to take charge, manage and dispose of the property assigned by McLeod; “that Neil McLeod did not pay the said forty per cent. of his said indebtedness, nor any other sum or amount of money there-

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on whatever, and that, in accordance with the conditions of their trust, they proceeded to sell all of the said trust property to the best advantage possible, and in every respect honestly and faithfully performed the obligations of their said trust, and that the amount of money realized from said sale was and is only the sum of twenty per cent. upon the said indebtedness of McLeod, which, upon the indebtedness of said Biaggio Luchesi, for whom they were garnished, amounted to the sum of two hundred and forty dollars in United States gold coin, which said sum they now bring into court and tender to the plaintiff herein upon said garnishment, and have at all times since the sale of said property been ready and willing to pay over the same."

It was admitted on the hearing of the rule in this proceeding, that the evidence offered by the garnishees is true, "except the opinions on the questions of their legal liability." It was also admitted that the plaintiff was entitled to receive whatever amount of money there was in the hands of said garnishees coming to Luchesi as a creditor of McLeod.

Thereupon the court entered judgment "against the said garnishees, * * * for the sum of four hundred and forty dollars," and costs.

From this judgment the garnishees appeal.

From the record it appears that the trustees of the creditors of McLeod sold the property to R. Sadler and Max Oberfelder (one of the trustees), in July or August, 1866.

Admitting for the purposes of this opinion (a point that is very doubtful,) that the proceedings against the garnishees were regular, and that the court thereby obtained jurisdiction to enter judgment against them, we are of the opinion that the court erred in rendering the judgment for four hundred and forty dollars.

We are unable to perceive how the plaintiff Luigi could obtain any greater right or privilege by virtue of the proceedings had in the district court than the defendant Luchesi possessed. He certainly cannot claim any greater sum from the trustees of the creditors of McLeod than Luchesi, a creditor, could have claimed if he had not been

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sued and his claim had not been attached. It was unnecessary for the trustees to obtain the consent of either Luchesi or Luigi to the sale of the property if they had authority to sell it by virtue of the execution and delivery of the agreement signed by all of the creditors of McLeod.

Were the trustees authorized to sell the property under the agreement for less than forty cents on the dollar of the indebtedness due from McLeod? This, in our judgment, is the material question presented by this appeal.

The clause in the agreement, that if forty per cent. of the indebtedness was paid within a certain time the property should be returned to McLeod, was evidently inserted because it was one of the conditions that induced McLeod to make the assignment, and was not, as counsel for respondent claims, a specific trust that the property should be sold for an amount not less than forty cents on the dollar of the aggregate claim of the creditors.

The agreement, though not as specific as it might have been made, will not, in our judgment, reasonably admit of the construction sought to be placed upon it by respondent. The authority to sell the property was clearly given to the trustees. The very object of the execution of the agreement evidently was to place the property in the hands of the trustees, in whom all the creditors had confidence, so as to enable them to act for the creditors without further consent. Under the terms of the agreement, the trustees were to act for the mutual benefit of all the creditors. The creditors were willing to receive forty cents on the dollar, and if that amount was paid the property was to "be returned to said McLeod;" if not paid, then the property was "to be sold for the benefit of all parties creditors hereto, and divided *pro rata* between said creditors." No restriction was placed upon the trustees, either as to the manner of the sale, the time when it should be made, or the price for which the property was to be sold. These were questions left to the good sense and sound judgment of the trustees, who were, of course, bound to act in good faith for the mutual benefit of all the creditors.

It is admitted that the sale was honestly made and fairly

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conducted, and there is no evidence tending to show that the property was sold for any less than its full value. Surely it requires neither argument nor authority for the statement that in such a case the trustees can only be held for what they actually received.

But, notwithstanding the admissions in the record, respondent argues that the trustees could not sell the property to one of their own number. If this proposition is admitted, in what position does it place the respondent? From the admissions in the record it is apparent that the trustees could not, in any event, be held for any more than the full value of the property. (*Osgood v. Franklin*, 2 John. Ch. 27; *Higgins v. Whitson et al.*, 20 Barb. 141; *Litchfield v. White*, 7 N. Y. 443; *Neff's Appeal*, 57 Penn. St. 96; *Pitt v. Petway*, 34 N. C. 69; *Roberts v. Roberts*, 65 N. C. 27.)

As respondent does not contend that the value of the property was any more than was obtained by the trustees, what difference does it make to him whether he accepts the amount the trustees actually received or recovers from them in proportion to the full value of the property? The latter position, if maintained, would necessitate a new trial and involve unnecessary costs and expense without any accruing benefit or advantage. Still, if the respondent desires to dismiss the proceedings herein and commence an action to recover the *pro rata* proportion of the full value of the property he ought, perhaps, to be given an opportunity to do so.

It is clear that in this proceeding no judgment can be sustained against the appellants in excess of the sum of two hundred and forty dollars, that being the amount they admit having received.

Under the peculiar facts and circumstances of this case, it is ordered that the judgment of the district court be reversed and cause remanded for further proceedings, unless the respondent, within twenty days after the filing of the remittitur herein, remits the sum of two hundred dollars and all costs incurred by appellants on this appeal, in which event the judgment as modified by the remission will be affirmed.

 Points decided.

This case affirmed & remanded on 13 Feb 442 -

[No. 795.]

**GOLDEN FLEECE G. AND S. M. CO. RESPONDENT,
v. THE CABLE CONSOLIDATED G. AND S. M. CO.
APPELLANT.**

ACTION TO DETERMINE THE RIGHT OF POSSESSION OF A MINING CLAIM.—

Under section 1674 of the compiled laws, which is designed to supplement section 2326 of the revised statutes of the United States, the pendency of a contest in the land-office, with respect to a mining claim, gives the district courts jurisdiction to determine the right of possession as between the adverse claimants.

IDEM—PROOFS HOW MADE—ACTUAL POSSESSION.—Each party must prove his claim to the premises in dispute, and the better claim must prevail. Actual possession makes out a *prima facie* case for the contestant and throws upon the defendant the burden of proving a superior right in himself.

IDEM—PROOF OF ACTUAL POSSESSION NOT NECESSARY.—Plaintiff may sustain this action without proving actual possession. A right to the possession is all that is necessary.

POSSESSION OF MINING GROUND, HOW PROVED.—Proof of a clearly defined surface claim surveyed and marked by a United States surveyor in accordance with law, including a quartz lode running with the claim, and work on the vein inside of the surface claim and within the lines of the disputed ground, is proof of possession sufficient to put the defendant on proof of its right.

ALIENS CANNOT LOCATE NOR HOLD MINING CLAIMS.—An alien who has never declared his intention to become a citizen, is not a qualified locator of mining ground, and he cannot hold a mining claim either by actual possession or by location against one who connects himself with the government title by compliance with the mining law.

LOCAL MINING DISTRICTS AND RULES.—The mining laws of the United States recognize and sanction the custom of the miners among organized mining districts to adopt local laws or rules governing the location, recording and working of claim not in conflict with state or federal legislation.

IDEM—TITLES TO MINING CLAIMS, HOW ACQUIRED.—It is not essential that mining districts should be organized, and local rules adopted, in order that mining claims may be held and the government titles acquired. A compliance with the mining laws of the United States is sufficient to secure the claim.

RE-LOCATION OF MINING GROUND.—Where the first claimant who takes up the claim is not a citizen, or has forfeited his right by non-compliance with the mining laws, or abandoned his claim, the mining ground staked off by him, is open to location by any citizen of the United States.

MINING RECORDER—PROOF AS TO RECORD OF CLAIM WHEN INADMISSIBLE.—Proof of a record is irrelevant without proof of some regulation making a record obligatory, or giving it some effect. The public law does not of

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itself create any such office as mining recorder; nor does it make the recording of claims obligatory, or give to a record any effect.

IDEM—LOCAL RULES.—The record is to be provided for and its effect determined by the local laws or regulations of miners in the respective mining districts, and if they fail to provide for a record then none is required.

IDEM.—If a record is provided for by local rules it must, under the provisions of the mining laws of the United States, contain an accurate description of the *locus* of the claim by reference to natural objects or permanent monuments.

PROOF AND EFFECT OF LOCATION BY ALIENS—QUESTION OF CITIZENSHIP, HOW DETERMINED.—Leonard, one of the five locators of the mining claim of defendant, stated, on cross-examination, that at the date of the location he was not a citizen, and had never declared his intention to become one. The court thereupon decided that the location of the claim was void, and excluded all evidence in regard to it, including the deeds of conveyance from Leonard, and his associates, to defendant; *Held*, that this action of the court was erroneous; that, as Leonard had parted with his interest, his admissions were not binding on his grantees, and that the question of citizenship was one for the jury, not the court, to decide.

IDEM—RIGHTS OF CO-LOCATORS.—There being no evidence tending to show that Leonard's co-locators were aware of his disability, or were colluding with him in his attempted fraud, if he was an alien: *Held*, that in such a case the law would be sufficiently vindicated by holding that the alien's claim is void.

LOCATION OF MINING CLAIMS—WHEN SURFACE LINES CANNOT BE CHANGED.—Under the mining laws of the United States, unaided by any supplementary miners' rules, there is no way of locating a quartz-vein, except by marking out surface lines, and when these lines have been marked, they cannot be changed so as to take in ground that has been located by others prior to such attempted change.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are sufficiently stated in the opinion of the court.

De Long & Belknap, for Appellant:

I. The motion for a nonsuit should have been granted. (38 Wis. 320.) Mining claims on the public lands must be held and worked in accordance with the local mining laws in force in the mining district where the same are located. (*Strong v. Ryan*, 42 Cal. 34; Revised Laws of U. S. sec. 2324.) There was no sufficient proof of the mining record being made by a proper officer or by any authority; or that

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the record was made, or the claim located, in accordance with any mining rules or regulations whatever. The mining laws of the locality govern the location and manner of developing the mines; and where they directly point out how such mining claims must be located, and how the possession, once acquired, is to be maintained, that course must be strictly pursued. (*Mallett v. Uncle Sam*, 1 Nev. 188; *Overman S. M. Co. v. Amer. M. Co.*, 7 Nev. 318.) Mining regulations and instructions issued by the general land-office: Skidmore, 37, sec. 12. Plaintiff must recover on proof of his own title, and not on the weakness of his adversaries. *Mallett v. Uncle Sam*, 1 Nev. 188.)

II. The court erroneously refused defendant the privilege of having a special verdict as required by law. (Nev. Stat., sec. 1238.)

III. The court erred in refusing the instructions asked for by defendant. (U. S. Rev. Laws, sec. 2324; *Overman S. Mining Co. v. Amer. S. Mining Co.*, 7 Nev. 318; Broom's Legal Maxims, sec. 353; *English v. Johnson*, 17 Cal. 107; *Atwood v. Fricott*, 17 Id. 37; *Rogers v. Cooney*, 7 Nev. 219; *Hess v. Winder*, 30 Cal. 349; *Morton v. Solambo C. M. Co.*, 26 Id. 527; *Ayers v. Bensley*, 32 Id. 620; *Potter v. Knowles*, 5 Id. 87; Skidmore, 37, secs. 13 and 14; Copp's Decisions, 59; U. S. Rev. Stats. sec. 2320.)

IV. The court erred in refusing to allow defendant to prove a delivery of possession by the original locators to Bennett and Free under the contract, and from Bennett and Free to the defendant. This proof was necessary not only to disprove the possession plaintiff claimed, and which it was necessary for it to have to maintain this action; but such possession being prior, continuous and actual, would render their location void as not being of unoccupied unclaimed land. (*Tule M. Co. v. Stranahan*, 20 Cal. 198; *Jackson v. Feather River W. Co.*, 14 Id. 22.)

V. Under a proceeding of this nature the only question referred to the state court to try is the right of possession. (U. S. Rev. Stats. sec. 2326; 1 Nev. Comp. Laws, sec. 1674.)

VI. The state constitution gives aliens who are *bona fide*

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residents of the state the same right to possess real estate as other persons enjoy. (Art. I, sec. 16.) Plaintiff had no right to cross-examine Leonard as to his citizenship; he could only be examined as to facts and circumstances connected with the matters stated in his direct examination. (*Landsberger v. Gorham*, 5 Cal. 450; *Jackson v. Feather River Water Co.*, 14 Id. 19; *Thornburg v. Hand*, 7 Id. 561; *Aitken v. Mendenhall*, 25 Id. 211.) The title of an alien is good as against the whole world, except the government, and can only be divested by the government by the exercise of its prerogative. (*Craig v. Leslie*, 3 Wheat. 590; *Fairfax v. Hunter*, 7 Cranch. 620; *Gouverneur's Heirs v. Robertson*, 11 Wheat. 356; *Jones v. McMasters*, 20 How. 8; *Jenkins v. Noel*, 3 Stew. (Ala.) 60; *People v. Folsom*, 5 Cal. 373; *Dudley v. Grayson*, 6 Mon. (Ky.) 260; *Buchanan v. Deshon*, 1 H. & G. (Md.) 280; *Sheaffe v. O'Neil*, 1 Mass. 256; *Jackson v. Smith*, 7 Wend. 368; *Munro v. Merchant*, 28 N. Y. 9; *Marshall v. Loveless*, Cam. & N. (N. C.) 217; *Doe v. Horintblea*, 2 Naiger, Id. 37; *University v. Miller*, 3 Dev. N. C. L. 191; *Groves v. Gordon Mill*, S. C. Const. 111; *Marshall v. Conrad*, 5 Call. (Va.) 364; *Osterman v. Baldwin*, 6 Wallace, 121; *Cross v. DeValle*, 1 Id. 8; *Bradstreet v. Supervisors of Oneida Co.*, 13 Wend. 546; *Ford v. Harrington*, 16 N. Y. 235; *Overing v. Russell*, 32 Barb. 263-5; *Ramires v. Kent*, 2 Cal. 558; *California v. Rogers*, 13 Cal. 160.)

Naturalization is held to have a retroactive effect, and is deemed a waiver of all liability to forfeiture and a confirmation of the alien's former title. (2 Blackstone, 249; 1 Johns. Cases, 401; *Briest v. Cummings*, 20 Wend. 353-4; Skidmore's Law Decisions, 66, sec. 3); therefore any defect in Leonard's title by reason of his not having declared his intention to become a citizen at the time he located this mine was cured by his act of declaring his intention to become a citizen before he deeded to the corporation. This was done before his alienage was determined or his incapacity to hold mining claims passed upon or decided. Leonard's declaration of intention confirmed his original title; it perfected his title as completely as it would had he made such declaration prior to making the location. But if Leonard could

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not locate a claim, his inability, if not cured by his subsequent act, would not operate to invalidate the entire location, but only his interest therein.

R. S. & W. S. Mesick, for Respondent:

I. This action is brought under the act of the legislature of this state Feb. 10, 1873. (Comp. L. secs. 1674.) The object of the action is solely to determine which party has the better right of possession to the quartz-vein in controversy under the act of congress of May 10, 1872, providing for the acquisition of mining title.

The quartz-vein is the principal subject of contest. The surface ground is a mere incident thereto. The incident, of course, must follow the fate of the principal matter, and to lose sight of the quartz-vein, and give entire attention to the surface, is to proceed upon false premises, and liable to lead to false conclusions. A person making a location upon a quartz-vein is entitled to follow that vein wherever it goes the distance that his claim extends by linear measurement upon the vein. The boundaries of the surface, which the location of said vein is allowed to hold as incident to the vein, must be regulated according to the direction of the vein, and, of course, can never be definitely determined until the course of the vein has been ascertained by actual exploration; hence it must inevitably happen that the boundaries of the surface, or incident, shall sometimes be changed so as to correspond with the course of the vein or principal matter, when that course shall have been ascertained. Unless the appellant has the better right to the quartz-vein in question, he has no right to the surface which can avail him in this proceeding.

The precise direction in which the vein ran was not, and could not, be known until the tunnel had been constructed, and only then to the extent that the vein had been traced thereby. While the Golden Fleece Company was in the possession of and had its works upon this vein, the defendant applied for a patent under such descriptions as made it necessary for the plaintiff to protest, and bring this suit for the protection of its title to and possession of the quartz-vein in controversy.

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II. There was no error in denying appellant's motion for a nonsuit. The authority cited from Wisconsin cannot be regarded, because it is in controvention of the latest decision of this court upon the same subject, and because it has no application to this case.

III. There was no error in the refusal of the district court to submit special issues to the jury. The practice act did not make it obligatory upon the court to submit to the jury the questions proposed by the defendant.

IV. Neither of the instructions mentioned in the appellant's brief, as asked by defendant to be given to the jury, and which were refused, was wholly correct, and if not they were properly refused. (16 Cal. 79.)

V. Leonard was proven to have been an alien at the time of making the location of the Golden Fleece; and, therefore, was rendered incompetent, under the laws of the United States to acquire any mining right by location, and his participation in that location rendered it void. The power of the court to try and determine the competency of locators to make a valid location is beyond question. The act of congress of May 10, 1872, explicitly declares that all valuable mineral deposits in land belonging to the United States shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intentions to become such. The effect of this provision must be to exclude all persons not belonging to either class described in that section. Under any rule of interpretation, the language of that section forbids the exploration, occupation, or purchase of any mineral deposits, or land mentioned therein, by any alien not having declared his intention to become a citizen of the United States; and also forbids any obstruction on his part to the free and open exploration, occupation, and purchase of such deposits and lands by those who may be qualified thereto. This amounts to a license or warrant on the part of the United States government to exclude from the public lands mentioned in said section all persons shown to be incompetent to explore, occupy and purchase the same.

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In the case of *Buckner v. J. B. Coates*, in September last, the secretary of the interior affirmed the decision of the general land-office, holding that an alien can hold no title in mining claims before patent issued. If that interpretation of the law is correct, then so far as Leonard is concerned, who was clearly proven to have been an alien, the Golden Fleece ledge and ground were open and free for exploration, occupation, and purchase when the location of McDonald was made, under which the plaintiff claims.

Our state constitution and laws, or the course of proceeding in the United States land-office, or the various cases and opinions referred to in the reports, are entitled to no consideration in construing this section. The incompetency of Leonard invalidated the whole claim. We admit the principle that whenever the good can be separated from the bad, in many cases a portion may be upheld while the remainder falls; but we also insist that the rule is equally well settled, that when the good cannot be separated from the bad, the whole must fall. Now, in this case, it seems to us beyond comprehension how the interest of the other four locators can be upheld while that of Leonard fails. To whom the seven hundred and fifty feet assigned to Leonard shall be allotted; or, if allotted to his co-locators, then in what proportion to each of them, and upon what conditions, are questions which counsel for appellant has not undertaken to answer. Nor are they capable of any answer under any recognized principle of law. They present such difficulties as the courts do not grapple with for the purpose of relieving from the consequences of a fraud.

By the Court, BEATTY, J.:

The defendant herein having made application for the government title to certain mining ground, the plaintiff filed an adverse claim to a portion of the premises, and thereupon commenced this action to determine the right of possession of the ground in controversy. The trial of the case in the district court resulted in a verdict and judgment for the plaintiff, and the defendant appeals from the judgment,

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and also from an order denying its motion for a new trial. The assignments of error are very numerous, but only a few of the questions involved have been fairly argued, and we shall confine ourselves to those questions.

The substance of the complaint is: That the plaintiff is the owner and in the actual possession of a claim of fifteen hundred linear feet of a lode called the Golden Fleece, and of a surface claim of three hundred feet on each side thereof; that the defendant claims some estate or interest in the said premises adverse to the plaintiff, and has applied for a United States patent for a portion thereof; that the plaintiff has protested and filed an adverse claim, and that the proceedings in the land-office have been suspended until the rights of the parties can be determined in a court of competent jurisdiction. It is further alleged, on information and belief, that defendant's claim to the ground is based upon certain pretended mining locations (describing them) which are said to be invalid by reason of the failure of the locators to comply with the law in making and recording them. Wherefore the plaintiff prays to be adjudged the owner and entitled to the possession of the disputed ground.

The answer admits an adverse claim to the ground described in the complaint, denies plaintiff's possession and right to the possession, and sets up a valid title to the ground described in defendant's application for a patent.

The testimony adduced at the trial showed that the two claims described in the complaint and answer, respectively, lie across each other. The plaintiff's claim extends from north-east to south-west fifteen hundred feet in length by six hundred in breadth, and the south-west end covers the middle of the defendant's claim, which extends from north to south fifteen hundred feet in length by six hundred feet in width.

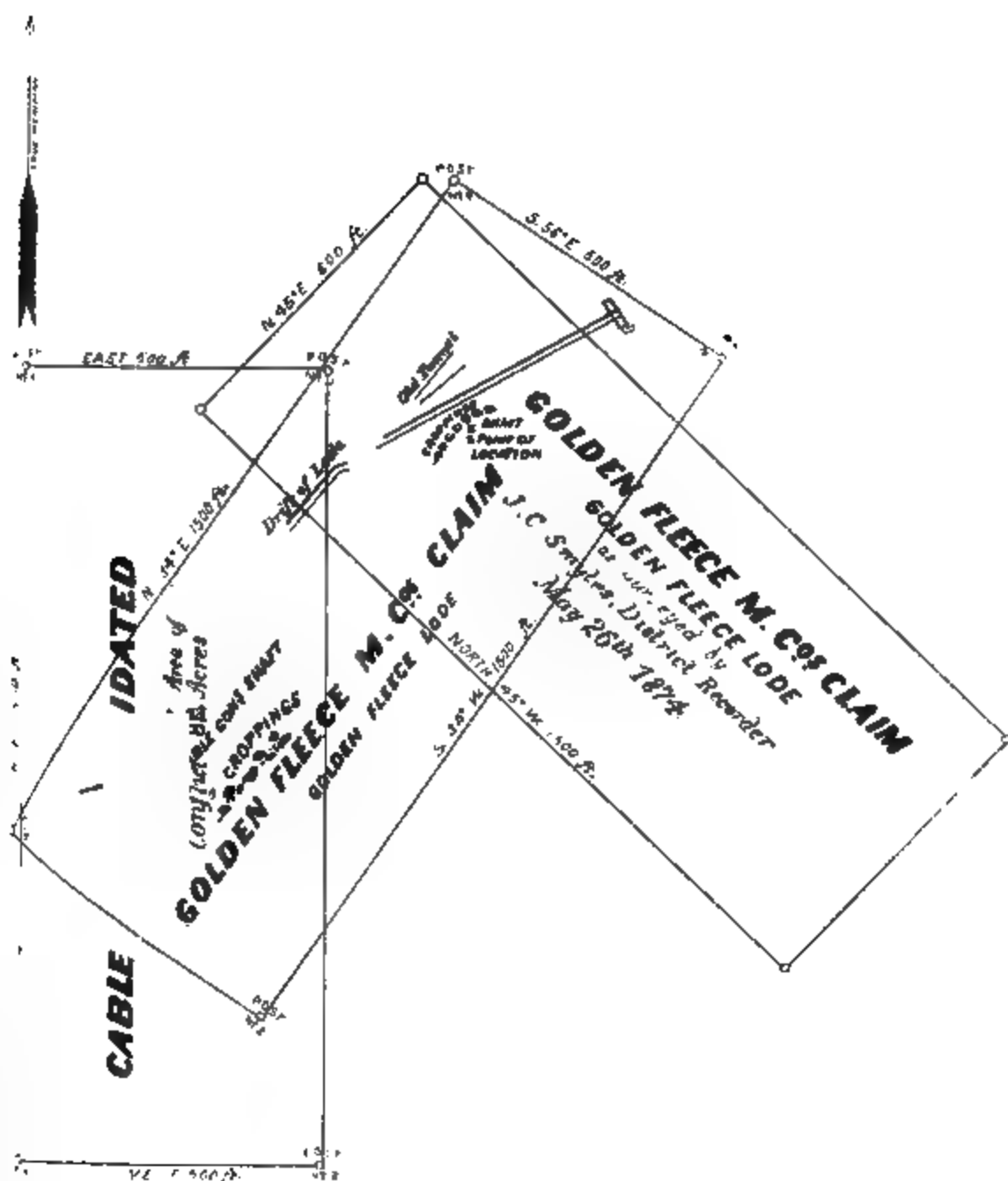
At the trial the plaintiff introduced evidence which, if true, established the following facts, among others: The plaintiff is a Nevada corporation; at and before the commencement of this action it was mining upon a well-defined lode of silver-bearing quartz, the croppings of which were exposed within the clearly-marked boundaries of its surface

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claim; that said boundaries embraced a portion of the ground claimed by the defendant, and that it had done some work within the lines of the disputed ground.

At the close of plaintiff's testimony the defendant moved for a nonsuit, and the ruling of the court denying the motion is assigned as error. The specifications under this head correspond to the grounds of the motion. The first of these, to which our attention is particularly invited, was stated as follows: "That the title of defendant, as pleaded by plaintiff, is not proven, or proven invalid."

The appellant contends that in an action of this sort the plaintiff, to escape a nonsuit, must not only prove affirmatively a *prima facie* right to the disputed premises, but must also plead and prove the particulars of defendant's claim, and prove that it is invalid. This is the doctrine of *Blasdel v. Williams* (9 Nev., 167), which was overruled in *Scorpion Company v. Marsano*, (10 Nev., 379.) We are asked to again review the question and to restore the rule of the former case upon the authority of a recent decision in Wisconsin. (38 Wis. 320.) That case, on examination, will be found to give only a partial support to *Blasdel v. Williams*, and we are very confident that, taking it into account, our last decision will be found to be supported as well by the number of decided cases as by the reason of the thing. A review of the question is, however, wholly unnecessary in this case, which is governed by the provisions of section 1674 of the compiled laws, passed February 10, 1873, and evidently designed to supplement section 2326 of the revised statutes of the United States, passed May 10, 1872. Under these laws the pendency of a contest in the land-office, with respect to a mining claim, gives our district courts jurisdiction to determine the right of possession as between the adverse claimants. The contestant, whether he is in or out of possession, must commence his action to determine the right within thirty days after filing his adverse claim. It would be absurd to hold that, if he happens to be the party in possession, and therefore presumably entitled to the possession, judgment must go against him, in favor of a party out of possession, unless he not only proves his own




MAP
*showing the outlines of the
location made by the*
CABLE CONSOLIDATED
AND
GOLDEN FLEECE CLAIMS
*and the change of surface
boundaries made by the*
GOLDEN FLEECE.


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right affirmatively, but disproves the claim of the defendant by negative testimony.

The only sensible construction of the law is, that each party must prove his claim to the premises in dispute, and that the better claim must prevail. Actual possession, admitted or proved, makes out a *prima facie* case for the contestant, and throws upon the defendant the burden of proving a superior right in himself. See 38 Cal 370
9 Cal 1
21 Cal 321
24 " 339

Another ground of the motion was, that the plaintiff had not shown that it was in the actual possession of the premises in controversy at the time the action was commenced.

Such proof was not necessary. A right to the possession was all it was essential for the plaintiff to prove. The complaint, it is true, alleged actual possession in the plaintiff, but that allegation was not essential to the statement of a good cause of action under the statute (C. L. sec. 1674); and the failure to prove it, if there had been a failure, would only have imposed upon the plaintiff the necessity of showing by some other means a right to the possession. But, in fact, the plaintiff did prove possession. It proved a clearly-defined surface claim, surveyed and marked by a United States surveyor in accordance with law, including a quartz-lode running with the claim, and work on the vein inside of the surface-claim, and within the lines of the disputed ground. This alone was enough to put the defendant on proof of its right. The plaintiff, however, went still further. It introduced testimony intended to show a location of the Golden Fleece claim in October, 1873, by one McDonnell, and conveyances from him. One of the grounds of the motion for nonsuit was the alleged invalidity of this location by McDonnell. There was no proof that McDonnell was a citizen, or had ever declared his intention to become a citizen. There was no proof that in making his location he had complied with any local rules or regulations of the miners of the district. The record of claim was not in accordance with the requirements of the United States mining law. When the surface lines of his claim were first marked out, the ground in controversy was

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already included in the well-defined boundaries of the defendant's surface-claim.

So far as the motion for a nonsuit is concerned, it has been shown that the validity of McDonnell's location is of no consequence. The plaintiff could have rested on its actual possession without claiming anything under McDonnell. But the validity of his claim is likely to be a question in any future trial of the case, and for that reason some of the objections to it will be considered. As to the first point, it is clear that an alien who has never declared his intention to become a citizen is not a qualified locator of mining ground, and he cannot hold a mining claim, either by actual possession or by location, against one who connects himself with the government title by compliance with the mining law. This much is certain; but it is not so certain that proof of citizenship must be made in order to show a valid location. It may be that the locator, in the absence of proof, will be presumed to be a citizen. This is a question, however, which has not been argued and will not be decided.

As to the second point, it is true there was no proof of compliance with any local rules on the part of McDonnell, but there was no proof of the existence of any local rules at the time the motion for a nonsuit was submitted. The defendant afterwards proved the existence of certain local rules of the mining district, but the court knew nothing of those rules when deciding the motion. The mining laws of the United States (R. S. secs. 2318 to 2346), recognize and sanction the custom long prevalent among the miners of this coast of organizing mining districts and adopting local laws or rules governing the location, recording and working of claims. Existing rules not in conflict with state or federal legislation are ratified, and express authority is conferred upon the miners in their several districts to adopt other rules, subject to certain specified restrictions. Miners are thus permitted to make rules in addition to those prescribed by congress; but, in order that mining claims may be held and the government title acquired, it is not essential that mining districts should be organized and

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local rules adopted. All that the government requires to be done in order to obtain its title or license to occupy is prescribed by the law; and, in the absence of local rules, a compliance with the public law will secure the claim. The miners, in their respective districts, may, if they choose, exact something more, but they are not obliged to do so, and no court, in the absence of proof, will presume that they have done so. In this case, the plaintiff had shown everything necessary to make a good claim under the United States mining law; that is to say, it had shown work on a vein within a well defined surface claim not exceeding fifteen hundred feet in length and six hundred feet in width. (R. S. secs. 2320, 2324.) It was not necessary to prove any record of the claim. A record is not required by the United States law, but is to be provided for, and its effect defined, by the local law. All the public law requires is that a record, to have any effect, must contain an accurate description of the *locus* of the claim, along with some other essentials. This question, however, will receive more particular attention in another connection. As to the last specification in this ground of the motion, it is true that the plaintiff's testimony did show that when its claim was surveyed and the boundaries marked, the defendant's boundaries had already been defined so as to include the ground in controversy. But the court could not assume, in deciding the motion for a nonsuit, the existence of the other facts essential to the validity of defendant's claim. It is a mistake to suppose that mining ground cannot be located if some other claimant has put stakes around it. The first claimant may not be a citizen, or otherwise capable of holding against a qualified locator, and he may not have complied with other requirements of the law, which are just as essential as the marking of boundaries. He may have forfeited, or he may have abandoned his claim. In any such case the ground is open to any citizen of the United States as completely as if no stake had ever been planted upon it. There were still other grounds specified in the motion for a nonsuit, but they have not been argued, and will not be discussed in this opinion. We think the court did not err in overruling the motion.

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The next assignment of error relates to the admission, against the defendant's objection, of a pretended record of McDonnell's location of the Golden Fleece. The principal ground of objection to this so-called record was that there was no proof that the claim was situated within an organized mining district, with rules providing for the making of records. This was a good ground of objection. Proof of a record is totally irrelevant without proof of some regulation making a record obligatory, or giving it some effect. The public law does not of itself create any such office as that of mining recorder. Neither does it make the recording of claims obligatory, or give to a record any effect. This is a matter left to the miners of the respective districts. If they make no rules requiring a record, none is required; if they give no effect to a record, evidence of a record is irrelevant. Another ground of objection to this record was that it contained no description of the claim by reference to natural objects or permanent monuments. This also was a good ground of objection, and would have been good even if there had been proof of a regulation of the district requiring a record. The mining law allows the miners to provide for the recording of claims, and no doubt it was the intention of congress that such record should have some practical effect—such as, for instance, to hold the claim for a reasonable time, until the vein could be so developed as to admit of an intelligent marking of the surface boundaries. But in order that the record should have such or any effect, it is imperatively required that it shall fix the *locus* of the claim by reference to natural objects or permanent monuments. (R. S., sec. 2324.) The court erred in overruling the objection to the record.

The motion for a nonsuit having been overruled, the defendant introduced evidence to show the existence and organization of the Peavine mining district, and its code of written regulations providing for a recorder and defining his duties. It also proved the posting and recording, by one Leonard and four others, of a notice of location of the claim described in its answer and in its application for a patent, and that said claim was situated in the Peavine dis-

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strict. It proved that Leonard and his co-locators complied with the United States laws and the local rules in locating, recording and working their claim. The testimony showed that their notice of location was posted on the ground August 11, 1873, while McDonnell's location of the Golden Fleece was not made till October 4 following. If, therefore, the Leonard location was valid and was kept good by compliance with the laws as to working, marking of boundaries, etc., the defendant, if it had been allowed to prove a conveyance from Leonard and his co-locators, would have showed an older and consequently a better title to the premises than that of the plaintiff, even allowing McDonnell's location to have been made in conformity to the laws.

But Leonard, who was a witness for the defendant as to the location and recording of its claim, stated, on cross-examination, that at the date of the location he was not a citizen, and had never declared his intention to become one. The court thereupon decided that the location of the Leonard claim was wholly void, and excluded all evidence in regard to it, including the deeds of conveyance from Leonard and his associates to the defendant.

This ruling was erroneous. In the first place Leonard's testimony, that he was not a citizen when he made the location, even if it had been more positive than it was, was not conclusive against the defendant. He had parted with all his interest in the premises, and his admissions were not binding on his grantees. The question of his citizenship was one for the jury, not the court, to decide (unless indeed the presumption was against his being a citizen, but as to this the court assumed the contrary with reference to McDonnell's location), and should have been submitted to the jury under proper instructions as to the effect of a finding one way or the other.

But Leonard's testimony, so far from sustaining the conclusion that he was not a citizen, had an opposite tendency. He said that he was born in New York; that he was taken at a tender age to Ireland, and returned to this country a few years ago. He had been advised that he was not a citizen, and, acting upon this advice, had made a declara-

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tion in February, 1874, of his intention to become a citizen. On this testimony alone it should have been found that he was a citizen by nativity.

But, besides this evidence tending to prove that Leonard was a citizen by nativity, besides the evidence that he had qualified himself to hold mining ground by declaring his intention to become a citizen in February, 1874—long before the plaintiff had taken possession or made a valid location of the ground in controversy—it was proved and admitted that two of Leonard's co-locators (grantors of defendant) were citizens at the date of the location. In order, therefore, to exclude all the evidence as to that location, and its conveyance to the defendant, it was necessary not only to hold that Leonard's claim was void, but to hold that the claim of his co-locators was void also. This the court did in fact decide, and, we think, erroneously.

Under the law a single qualified locator may take up fifteen hundred feet of a vein with the surface ground extending three hundred feet on each side of the croppings. An association of a dozen or a hundred locators can take up no more. Here were five locators claiming in common no more than any one of them might have taken. They claimed fifteen hundred feet of the vein with the surface ground allowed by law. By figures placed opposite their respective names, as signed to the notice of location, they indicated the number of undivided feet that each was to own. Leonard's share was seven hundred and fifty feet. The rest was divided among his four co-locators, two of whom at least were citizens. Suppose, then, Leonard was not capable of making a location, how does that fact render the whole claim void? It is said that Leonard's claim was a fraud upon the law. But, admitting his claim to have been fraudulent, there is not a particle of evidence tending to show that his co-locators were aware of his disability, or that they were colluding with him in his attempted fraud. They certainly were not guilty, and it would be a harsh rule indeed to make them suffer for the fraud of Leonard, merely because they were willing to admit him to a share in a location which they might have taken to themselves

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alone. The law in such cases will be sufficiently vindicated by holding that the alien's claim is void. And this course will not lead to the difficulties apprehended by counsel for respondent. It is not necessary to decide what would become of his claim. It might be open to location by a stranger, or it might have to be distributed among the qualified owners. Counsel for respondent think it would have to be distributed among the qualified owners unless the whole claim is held void, and, assuming that there is no rule of law by which such distribution could be made, they argue that the only alternative is to declare the claims of all the locators void. We think, however, that there would be no greater difficulty in making the distribution, if it had to be made, than there would be in the case provided for in the mining law where one of several co-owners refuses to contribute his share of the work necessary to preserve the claim.

The court erred, therefore, in excluding the conveyances from the locators of the Leonard claim; first, because the evidence would have warranted the jury in finding that Leonard was a citizen; second, because he declared his intention to become a citizen before he conveyed to defendant, and it was a question for the jury to decide whether at the time he thus became qualified to hold a mining claim plaintiff or its grantors had acquired any adverse rights; third, because if Leonard had no title to convey, his co-locators did have an undivided interest in the location at least, if not the whole of it, and did convey to the defendant.

For this error the judgment must be reversed and the case remanded for a new trial. But the court also erred in deciding another important question, which must arise at the next trial, and which ought, therefore, to be noticed in this opinion.

There was testimony going to show that when the Golden Fleece was originally located the vein was supposed to run northwest and southeast, and that the surface-claim was so marked out on the ground; that subsequently and long after the Leonard claim had been located, according to its present boundaries, and even after the official survey made for

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the purpose of the application for a patent, the plaintiff, discovering that the vein ran northeast and southwest, swung its claim around almost at right angles to its former position, had a new survey made and planted its present boundary stakes so as, for the first time, to include any portion of surface-ground in dispute. In view of this testimony the defendant asked several instructions, which were refused, to the effect that the plaintiff was bound by its original marking of boundaries in favor of a subsequent locator.

Counsel for respondent justify the refusal of these instructions on the ground that its location was of the vein, as the principal thing, and of the surface as a mere incident thereto, and that when the mistake in the direction of the vein was discovered, it had a right to change the lines of its surface claim, even though by so doing it encroached upon the claim of a subsequent locator. Undoubtedly, this was the law as applied to locations made under the miners' rules formerly in force. Under those rules a location could be made, and commonly was made, by posting a notice in reasonable proximity to the point at which a lode was discovered or exposed, stating that the undersigned claimed so many feet of the vein extending so far, and in such direction or directions from the discovery point, together with the amount of adjacent surface ground allowed by the rules of the district. This notice, so posted, had the effect, under the rules, of holding the ground described a certain length of time—commonly ten days—after which it was necessary to have the notice recorded by the district recorder in order to keep the claim good, and to follow up the record by doing a certain amount of work every month or every year. This was substantially the mining law of the Pacific Coast for the location, recording and holding of claims; and a compliance with these rules stood in the place of actual possession within defined boundaries and was allowed the same effect. The claim was defined by the terms of the notice and not by posts and monuments erected on the surface of the earth. The notice claimed so many feet of the vein with the adjacent surface. If subsequent de-

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velopments demonstrated that the course or strike of the vein differed from that mentioned in the notice, the locator was still allowed to follow the vein to the extent claimed, because there was no difficulty in reconciling the description in the notice with the deflection in the vein from its apparent course at the discovery point, and because the claim in fact was of so much of the vein wherever it might run. As the surface ground allowed by the miners' rules was a mere incident to the vein and was to be adjacent to it, and was never marked by posts or monuments any more than the vein itself, it followed, as a matter of course, that when the true course of the vein was discovered the surface ground was located in conformity to it.

In this case, however, the plaintiff does not base his claim on compliance with any mining rules. It has proved nothing more than an actual possession of its claim, or, at most, a substantial compliance with the United States law in marking out a surface claim and working on the lode within its boundaries. Under that law it cannot be doubted that it is bound by the lines of its surface claim in favor of a subsequent locator. It is true that the vein is the principal thing and the surface is but an incident thereto; but it is also true that the mining law has provided no means of locating a vein except by defining a surface claim, including the croppings or point at which the vein is exposed; and the part of the vein located is determined by reference to the lines of the surface claim. Those lines are fixed by the monuments on the ground, and they cannot be changed so as to interfere with other claims subsequently located.

We wish to be clearly understood as giving a construction to the law of congress, standing alone and unaided by any local rules. Under the law miners are allowed to make rules in regard to the location and recording of claims; and it would seem to have been the intention of congress to sanction some such rules as formerly prevailed on this coast, under which the posting of a notice would hold a claim on the vein a reasonable time, during which the locator might make a survey of the location point with reference to natural objects or permanent monuments in the neighborhood.

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He could then append a sufficient description of the *locus* of his claim when he had it recorded, and the record might then be allowed to hold the claim for a further reasonable time, until the vein was so far developed as to admit of a correct establishment of the surface lines. This would seem to be a more reasonable view of the meaning of that provision of the law allowing miners to make supplementary rules than that taken by the commissioner of the land-office. (See his instructions to surveyors, etc., dated February 1, 1877.) He appears to think that no regulation of the miners can dispense with the marking of the boundaries of the surface claim as the very first step toward a location. If this is so, it is difficult to see what office a notice of location and the recording of it have to perform. The requirements of the law as to what the record shall show are evidently designed to fix the *locus* of the claim, in order to prevent floating. But the monuments defining the claim on the ground answer this purpose better than the record, and if they are to be erected in the beginning, there can be but little use ever to make a record; and, in fact, it is not made obligatory by the law, as we have shown in another connection.

These questions, however, in regard to what rules the miners may make, are not involved in this case, and are not decided. What has been said in regard to the matter has been said only for the purpose of avoiding any misunderstanding of the points that are decided. All that is decided in respect to this last assignment of error is, that under the law of congress, unaided by any supplementary miners' rules, there is no way of locating a quartz vein except by marking out surface-lines, and that when these lines have been marked they cannot be changed so as to take in ground that has been located by others prior to such attempted change.

The judgment and order appealed from are reversed and the cause remanded.

HAWLEY, C. J., concurring:

I concur in the judgment of reversal, upon the grounds stated in the opinion of the court.

Points decided.

As to the last point discussed in the opinion, I agree that the original locator cannot swing his surface location so as to claim any other surface-ground. He is, so far as the surface-ground is concerned, bound by the lines designated upon the surface. (U. S. Mining Laws, sec. 2322.) But I do not believe that under what seems to me to be a fair and reasonable construction of section 2322, it was the intention of congress, by the passage of the mining laws, to prohibit the first locator of a quartz lode from following his vein, with all its dips, spurs, angles and variations, along its course, to the full number of feet expressed in the notice of location, not exceeding fifteen hundred feet and not extending "through the end lines of his location," in whatever direction it runs, irrespective of the vertical side lines of the surface boundaries. Although the question as to the right of a party thus to follow his lode is not directly denied in the opinion; yet I do not desire to indorse any of the reasoning of the court, which would seem, even by inference, to be at variance with the views I have expressed.

[No. 836.]

J. C. HAGERMAN, RESPONDENT, v. TONG LEE, DEFENDANT, P. N. MARKER, APPELLANTS.

CONTEMPT—WHEN APPEAL LIES.—An order adjudging garnishees to be in contempt of court for failing to pay over money, is in the nature of a civil process, and is, under the principles decided in *Phillips v. Welch* (11 Nev. 190), an appealable order.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION—STATUTES CONSTRUED.—In proceedings supplementary to execution the judgment creditor can, in a summary manner, compel the disclosure of any property belonging to the judgment debtor in the hands, or under the control of any other person, and of any indebtedness due to the judgment debtor.

IDEM.—The judge or referee can only order property to be applied to the satisfaction of the judgment when the debtor's title thereto is clear and undisputed.

IDEM.—If there is any dispute as to the ownership of the property, or if the person proceeded against, in good faith, denies the debt, neither the judge or referee has any power or authority to decide the disputed question and order the property delivered, or money adjudged to be due to be paid over, in satisfaction of the judgment.

IDEM.—If the debt is denied the only course for the plaintiff to pursue is to

Argument for Respondent.

apply for an order forbidding any transfer or other disposition of the debt, and for an order authorizing the commencement of an action in the proper court for the recovery of the debt as provided in section 246 of the civil practice act.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are sufficiently stated in the opinion of the court.

Boardman & Varian, for Appellants:

The liability of a garnishee fixed by section 130 of the practice act, under our practice must be finally concluded by judgment in suit brought for the purpose. The practice of concluding the garnishee by judgment in the original suit does not prevail in this state. On question of denial and conflicting claims, see 11 Ohio St. 11, 324; 7 Robertson, 64; 17 N. Y. 482; 40 Barb. 242; 5 How. 448; 9 How. 100; 12 How. 509; 13 How. 137; 21 How. 20; 3 Daly, 377; 4 Bosw. 683. On right to imprison for failure to pay over money, see 6 Ohio St. 260; 47 N. Y. 372.

Thomas E. Haydon, for Respondent:

I. In proceedings supplementary to execution, the powers of the judge and those of the referee are co-extensive, see secs. 241, 245, 246, except the referee cannot punish for contempt, sec. 247. And the order made by the referee is *res adjudicata*. (*McCullough v. Clark*, 41 Cal. 298.) The referee is not bound to take the *ipse dixit* of the garnishee, that he does not owe, or that he denies the debt; he examines witnesses and determines such issues for himself on all the evidence. (*Parker v. Page*, 38 Cal. 522; 41 Cal. 298, *supra*.) The order of the referee when made is an adjudication of the subject, is a finality, is appealable, and needs no action of the court to vitalize it. (*McCullough v. Clark*, 41 Cal. 298; *Figg v. Snook*, 9 Ind. 202; *Mason v. Weston*, 29 Ind. 561; *Driggs v. Williams*, 15 Abb. N. Y. 477; *In Re Remington*, 7 Wis. 643; *Gould v. Torrance*, 19 How. Pr. 560.) The order of the referee being appealable, appellant should, if he desired to have the court review the

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evidence, have filed a statement within twenty days after the entry of the order of the referee, containing the evidence and also the findings. (Sec. 332 Pr. Act; *Bowker v. Goodwin*, 9 Nev. 135; 8 Cal. 322; 11 Id. 132; 12 Id. 412; 30 Id. 218; 15 Id. 313.) The order of the court overruling Marker & Co.'s motion to set aside the order of the referee was not an appealable order. Hence everything in the statement in reference to such motion to vacate was, and is, immaterial. (*Allender v. Fritts*, 24 Cal. 447; *Henly v. Hastings*, 3 Id. 341; *Stearns v. Marvin*, 3 Id. 376.)

II. Proceedings supplementary to execution are tantamount to a creditor's bill—a suit in equity in which the right of trial by jury does not exist.

By the Court, HAWLEY, C. J.:

Appellants were brought into court in the above entitled suit under the provisions of section 243 of the civil practice act, relating to proceedings supplementary to execution. The district court appointed a referee, with full power to hear and determine all questions arising upon the examination of the parties, and to make all due and proper order therein, etc.

On the twelfth day of December, 1876, the referee made an order requiring P. N. Marker & Co. to pay over to the sheriff the sum of six hundred and sixty-nine dollars and eleven cents in satisfaction of the judgment recovered by the respondent Hagerman, against the defendant, Tong Lee. On the twentieth day of January, 1877, the court overruled appellant's motion to set aside said order of the referee. On the thirtieth day of January the court made an order that said P. N. Marker and John Marker (P. N. Marker & Co.) pay over the amount ordered by the referee within two days, "and unless they so pay then that they stand committed and be imprisoned in the county jail of Washoe county until they, or either of them, shall pay said sum and the costs of the proceedings for contempt."

This appeal is taken from each of these orders. The notice of appeal was filed January 30, 1877, and the statement on appeal was filed on the second day of February, 1877.

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The order made by the referee was an appealable order. (*McCullough v. Clark*, 41 Cal. 299,) and the statement on appeal not having been filed within twenty days after the order was made, as required by section 332 of the civil practice act, cannot be considered on the appeal from that order.

The order of the court adjudging appellants to be in contempt upon failure to pay over the money, is in the nature of a civil process, and is, under the principles decided in *Phillips v. Welch*, 11 Nev. 190, an appealable order. (See also *Forbes v. Willard*, 54 Barb. 520.)

The statement on appeal, therefore, in so far as it relates to the last order, is properly before us for consideration. From this statement it appears, among other things, that when P. N. Marker was garnisheed he made "a written statement to the effect that there was no sum due from him to the said Tong Lee, but that he had a contract for cutting wood with Tong Lee; that the same was not then completed; that no sum was then due thereon, but that when the same is completed there may be some sum due him, but what amount he was then unable to state." Subsequently, P. N. Marker & Co., in answer to the order compelling them to show cause why they should not pay over the money or in default be committed for contempt, allege that they at all times denied, and still do deny, "any indebtedness due or owing * * * to the said Tong Lee." They also allege "that it is not in the power of said copartnership to at present comply with the order of the referee."

These statements seem to have been made in good faith; at least there is no finding to the contrary. The question presented by the record necessarily involves a construction of sections 243, 245, 246 and 247 of the statute relating to proceedings supplementary to execution.

Under these proceedings the judgment creditor can, in a summary manner, compel the disclosure of any property belonging to the judgment debtor in the hands or under the control of any other person, and of any indebtedness due to the judgment debtor, and for this purpose great latitude is usually allowed in the examination. The creditor is always entitled to prosecute the inquiry to such an extent

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as to enable him to ascertain the true condition of the property and business affairs of the judgment debtor. (*McCullough v. Clark, supra.*)

But we do not think that the statute authorizes the court or referee to make an order requiring any person whom the creditor claims is indebted to the judgment debtor to pay over money in satisfaction of the judgment, unless such person admits the indebtedness and acknowledges the possession or control of the amount due, or these facts are established by clear and indisputable evidence. When the affidavit provided for in section 243 is filed the foundation is laid to commence the inquiry whether the person or corporation has any property which can be applied to the satisfaction of the judgment. (*Hathaway v. Brady*, 26 Cal. 589; *Edgerton & Wilcox v. Hanna et al.*, 11 Ohio St. 323.)

The provision as to “property of the judgment-debtor,” “or due to the judgment-debtor,” in section 245, gives authority to the judge or referee to order any person who has possession of goods, specific money, or other property belonging to the judgment-debtor, or due to him, to deliver or pay over the same, “to be applied to the satisfaction of the judgment.” (*Union Bank of Rochester v. Union Bank of Sandusky*, 6 Ohio St. 261; *Edgerton & Willcox v. Hanna et al., supra*; *West Side Bank v. Pugsley*, 47 N. Y. 374.)

But “if it appears that a person or corporation alleged to have property of the judgment-debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment-creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court and judge may, by order, forbid a transfer or other disposition of such interest or debt until an action can be commenced and prosecuted to judgment.” (Section 246.) If any person disobeys an order of the referee properly made in the proceedings, “he may be punished by the court or judge ordering the reference for a contempt.” (Section 247.)

When these various sections are considered together, it seems perfectly plain that the judge or referee can only order

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property to be applied to the satisfaction of the judgment when the debtor's title thereto is clear and undisputed. If the plaintiff only claims, as in this case, that the person under examination is indebted to the judgment-debtor, then the judge or referee can only order such person to pay over the money when such person admits the indebtedness, and acknowledges his ability to pay the amount due, or these facts are established by other equally clear and indisputable evidence.

If there is any dispute as to the ownership of the property, or if the person proceeded against in good faith denies the debt, neither the judge nor the referee has any power or authority whatever, in these proceedings, to decide the disputed question and order the property delivered, or money adjudged to be due to be paid over in satisfaction of the judgment.

In this proceeding, the debt having been denied, the only course for the plaintiff to have pursued, if he desired to contest the matter, was to apply for an order forbidding any transfer or other disposition of the debt, and also for an order authorizing the commencement of an action in the proper court "for the recovery of such * * * debt," as provided in section 246. (*Rodman v. Henry*, 17 N. Y. 484; *Parker v. Page*, 38 Cal. 526; *Stewart v. Foster*, 1 Hilton, 508; *Barnard v. Kobbe*, 3 Daly, 377; *Alexander v. Richardson*, 7 Robt. 64; *Crounse v. Whipple*, 34 How. Pr. 335; *Beebe v. Kenyon*, 3 Hun. 74; *West Side Bank v. Pugsley*, *supra*; *Hathaway v. Brady*, 26 Cal. 593; and other authorities cited in appellants' brief.)

The order made on the thirtieth of January, is clearly erroneous, and must be reversed.

It is claimed by respondent's counsel that there is nothing in the record to show that appellants denied the debt at the time the referee made the order requiring them to pay over the money, and he thereupon argues that this order was properly made, and that it ought not to be disturbed. If it affirmatively appeared from the order that Marker & Co. at that time admitted the indebtedness, and acknowledged their ability to pay it, the position of counsel would be cor-

Argument for Appellant.

rect. (*Beebe et al. v. Kenyon*, 3 Hun. 73.) But the order does not, upon its face, contain any such statement. It not only fails to state the facts necessary to sustain it, but it affirmatively states facts which show that the referee had no authority in the premises to make any such order.

It appears from the order that the referee, "from the pleadings, files and record of said cause, and from the testimony and documentary evidence presented" upon the examination, adjudicated upon and determined the disputed question as to the indebtedness. This being true, the order shows upon its face that it is absolutely null and void. (*People ex rel. Williams v. Hulburt*, 5 How. Pr. 448.)

The orders appealed from are reversed, and cause remanded for further proceedings.

[No. 848.]

THE STATE OF NEVADA, RESPONDENT, v. CLARK
COWELL, APPELLANT.

BURGLARY—INTENT.—In order to constitute the crime of burglary it is just as essential to prove the intent as it is to prove the entry.

IDEM—RELEVANCY OF TESTIMONY.—To make testimony relevant it is not necessary that it should be essential; although cumulative and superogatory it may be received.

IDEM—PREVIOUS AGREEMENT TO COMMIT ROBBERY.—Defendants were jointly indicted for the crime of burglary in entering the dwelling-house of one Alderson with intent to steal. Upon the trial one of the defendants, on behalf of the state, was allowed to testify that a few days before the commission of the burglary, he and the other defendants agreed to commit a robbery on the person of said Alderson; that they did not rob him because the witness said he had nothing to be robbed of; that the other defendants were watching Alderson on the street for that purpose: *Held*, admissible and relevant, as it tended to prove the intent of defendants at the time of the entry into the dwelling-house.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are stated in the opinion of the court.

Crittenden Thornton, for Appellant:

I. The admission of Winnie's testimony was erroneous in any view of the case, and is unsupported by reason, argu-

Argument for Appellant.

ment or authority. The ruling of the court transgressed the first of the four cardinal principles which govern the production of evidence in all courts of justice, either civil or criminal. (1 Green. Ev. sec. 51-53; Roscoe Crim. Ev. 83, and cases cited; *People v. Jones*, 31 Cal. 571; *State v. Huff*, 11 Nev. 17; *People v. Barnes*, 48 Cal. 551.) The exceptions to the general rule may be classed under four general heads: First. Evidence of facts constituting the *res gestæ*, concurrent in point of time with, and explanatory of the fact alleged or the offense charged; Second. Evidence of repeated offenses of a similar character to show the *animus* or *sciente* of a specific crime, as, *exempli gratia* a previous recent threat or assault in a prosecution for murder, or several utterings of counterfeit bills to show guilty knowledge of their spuriousness. Where a conspiracy is proven, evidence of separate acts of the conspirators which may tend to prove the common intent toward the desired end; Fourth. Where the specific act proven is but an element or ingredient of crime on trial, or a step towards its successful perpetration. The facts concerning the conspiracy to rob Alderson, as detailed by Winnie, were not a part of the *res gestæ*. They were not contemporaneous in point of time; they were not performed in the accomplishment of a purpose or design to break into Alderson's house; the intent to rob was formed, acted upon, and abandoned forever in a single day; not a single step in the conspiracy to rob advanced the scheme to plunder Alderson's house in any manner. If it had been shown that the defendants, by their contemplated assault upon Alderson, had intended to procure a key as the means of entrance to his dwelling, or to disable him by taking away his weapons, or breaking his limbs, from successfully resisting their contemplated raid upon his house, the testimony would have been entirely proper. (*State v. Ferguson*, 9 Nev. 119; *Enos v. Tuttle*, 3 Conn. 250; *State v. Ah Loi*, 5 Nev. 100.) But it has never been decided that an act done by a conspirator in pursuance of one purpose could be given in proof of an intent to effect another. The crime of burglary is based upon a specific action done with a fixed and definite intent. A general pur-

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pose to defraud or a general dislike, or personal enmity, toward the person whose dwelling is broken open, is not within the statute. There must be the intent to steal or commit one of the other felonies named in the statute. Any other intent or purpose which falls short of complete perpetration is apart from the issue. The intent to steal, which is an indispensable ingredient of the crime of burglary, is sufficiently proven by the act of theft. The sole intent which the law punishes, namely, to steal after entrance is sufficiently proven by stealing in fact.

II. A specific crime of the same class or of any other class can only be relevant where the former is but a link in the chain to the latter, or where both constitute a single transaction. (*Shaffner v. Commonwealth*, 72 Pa. 60; *Brown v. Commonwealth*, 73 Pa. 321; *Rex v. Ellis*, 6 B. & C. 147; *Rex v. Long*, 6 C. & P. 179; *Reg v. Bleasdale*, 2 C. & K. 765.) In law and in fact a conspiracy to break into a man's house is separate and distinct from a conspiracy to rob him on the highway.

John R. Kittrell, Attorney-General, for Respondent:

There was no error in permitting the testimony contained in the record concerning the antecedent attempt to rob witness Alderson. It tended simply to corroborate the testimony given by the accomplice Winnie, on the trial of appellant, and was really a part of the transaction.

The testimony tended to show that the several defendants had been in league to plunder or to rob Alderson, and that the original design to rob him on the highway culminated in the commission of the crime of burglary, for which the appellant was convicted.

By the Court, LEONARD, J.:

Defendants were jointly indicted for the crime of burglary in entering the dwelling-house of J. H. Alderson, in the town of Eureka, in the night-time of the third day of March, 1877, with the intent then and there to steal the goods and chattels of said Alderson. Cowell and Winnie were convicted and sentenced. Cowell appeals from the

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judgment and the order overruling his motion for a new trial. A portion only of the testimony is contained in the transcript. On the trial defendant Winnie testified on behalf of the state as follows:

“The defendants, Cowell, Graham and myself, broke into the dwelling-house of Alderson and took away the goods of Alderson, on or about the time mentioned in the indictment. Before that time Graham, Cowell and myself had a number of conversations in reference to the robbery of Alderson’s house. *On one evening, in one of these conversations, a few days before the commission of the burglary alleged in the indictment, I, Cowell and Graham agreed to commit a robbery on the person of J. H. Alderson, on a public street in Eureka, as Alderson was returning home. We did not rob him, because I told them he had nothing to be robbed of that night. Cowell and Graham were watching Alderson on the street for that purpose.*”

Counsel for defendants objected to this testimony on the ground that it was immaterial and irrelevant to the issue pending, and prejudicial to the defendants, and calculated to prejudice the jury against defendant Cowell; and after such testimony was given counsel for defendant Cowell moved to strike it out.

The court overruled appellant’s objection and denied his motion to strike out. Exceptions were taken to the rulings of the court. J. H. Alderson and James Sias testified to facts tending to corroborate the testimony of defendant Winnie in regard to the commission of the alleged burglary by defendants; and a letter was introduced in evidence by defendant Cowell, tending to show his connection with the burglary mentioned in the indictment. The record shows that appellant objected to all the testimony of Winnie, quoted above, and that he moved to strike it all out. The portion not italicised is certainly not open to the objections made. Surely, that part is material and relevant to the issue. There is more doubt as to the italicised portion; but we are of the opinion, under all the circumstances of the case, that the court did not err in its rulings. It was the province of the jury to judge of the weight and value

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of Winnie's testimony, and of the court to decide as to its materiality and relevancy. The jury found the portion true which directly appertained to the crime charged, and there is nothing in the record which in any manner contradicts the italicised parts. The court admitted the testimony against the objection of counsel for appellant, and refused to strike it out, as stated above. The action of the court in this regard is the only error urged or claimed by appellant. We shall, therefore, confine ourselves to this assignment.

It should be borne in mind that in order to constitute the crime of burglary, the defendant must not only enter some one of the structures mentioned in the statute, at the time and in the manner therein stated, but he must enter with intent to commit some one of the crimes specified. It is just as essential to prove the intent as it is the entry. If both are not proven to the satisfaction of the jury beyond a reasonable doubt there can be no conviction. The *quo animo* constitutes an indispensable part of this crime, just as the *scienter* does in forgery and counterfeiting; and the rule of evidence governing proof of each is the same. (1 Greenl. Ev., sec. 53.)

In this case it was charged in the indictment that the defendants entered with intent to steal, take and carry away the goods and chattels of J. H. Alderson. It was incumbent upon the state, then, to prove the intent alleged. It is true, if defendants entered Alderson's house, as stated in the indictment, and stole his property, the jury were at liberty to infer from those two facts that they entered with the intent to do just what they did do; and probably it was unnecessary, in fact, for the state to show the intent by other proof. But although this was true, if the other facts testified to by Winnie tended to show the intent of defendants at the time of entry, then the most that can be said against their admission is that they were cumulative of what had already been proven by the same witness. This fact would not make them incompetent or irrelevant; nor would it render them immaterial, except in the sense that the intent was sufficiently established without them. It would be strange

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indeed, if a second witness could not testify upon a fact already testified to by a former witness, or if the same witness could not state facts tending to sustain his former statements, without opening the door to an objection on the ground of immateriality. "It should be remembered that under the head of relevancy the question is not whether the evidence offered be the most convincing, but whether it tends at all to illustrate the question. To make testimony relevant, it is not necessary that it should be essential. Though cumulative and super-roductory, it may be received." (1 Phil. Ev. 622; Cowen & Hill's and Edward's Notes.) If, then, the testimony of Winnie in relation to the agreement to rob Alderson tended to prove an essential element of the crime with which defendants were charged, to wit: their intention to steal the goods and chattels of Alderson, the court did not err in its rulings. We think it did tend to prove such intent.

It is evident from the testimony of Winnie that prior to the burglary, defendants had numerous conferences in relation to entering Alderson's house for the purpose (using the language of the witness) of "robbing" it; that on a certain evening prior to the burglary, when they were conspiring together concerning the contemplated burglary, they concluded and agreed to rob Alderson on the street, while going to his home in the evening. They did not commit the robbery, for the reason that they ascertained through Winnie that Alderson had no money on his person that night. In all their conversations and conferences they had but one object in view, and that was, by force or stealth to get the property of Alderson. The means proposed to be used in carrying out their scheme were different, but the end to be attained was always the same. Their only object in meeting was to devise ways and means whereby they could accomplish their object. On the same evening and at the same meeting, they talked about breaking into Alderson's house and robbing him on the street. It is apparent that robbery seemed the more feasible plan, which they adopted. After failing in that, they then pursued their original idea and consummated their object by burglary. Night after night they

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met and consulted as to the manner of accomplishing their common design, and each subsequent meeting must be regarded as a continuation of former ones. The ineffectual attempt to rob Alderson on the street was apparently a link in the chain of acts that commenced at their first meeting, and ended with the burglary. Suppose, after failing to accomplish their purpose by robbery, they had gone directly from the street to Alderson's house and there effected an entry, but, after entering were interrupted by some means so that they committed no theft; or suppose all their conversations had been on the night of the burglary; that they first talked of "robbing the house," but finally concluded to rob Alderson on the street; that they failed in the latter and proceeded from the street to the house, and, after entering, by reason of an interruption stole nothing. In either case, if they had made the entry with the intent to steal, they would have been guilty of burglary, and yet there would have been no proof of the intent unless that can be shown in such case by just such facts as are objected to by appellant. It would seem that in the case first supposed, the fact of an ineffectual effort to rob on the street, together with the further fact that they followed their man from the street to his house, would at least tend to show for what purpose they entered the house. It might not be sufficient to convict in the minds of the jury, but it would certainly be a matter to be placed before them for their consideration; and in the second case supposed we feel confident that proof of their conversations, showing the object they had in view and the intermediate attempt at robbery, together with the culminating act of entry, would all be admissible for the purpose of showing intent. On principle, we are unable to find any distinction between the cases mentioned and the one in hand. If the defendants had agreed at one of their conferences that they would have Alderson's money in some manner, and if they could not get it by robbery they would by burglary, or the reverse, it is certain that such agreement would have been admissible to prove intent. It was equally proper to allow facts to be proven which tended to show such a design.

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Mr. Roscoe says: "Of course all evidence directly bearing on any offense, which can be, and is, under the indictment before the jury, made the subject of inquiry, is admissible. So, also, and almost equally, as a matter of course, evidence may be given not only of the actual guilty act itself, but of other acts so closely connected therewith as to form a part of one chain of facts which could not be excluded without rendering the evidence unintelligible. Thus, in a case cited by Lord Ellenborough, in *R. v. Whiley* (2 Lea., 985, S. S., 1 New Rep., 92), where a man committed three burglaries in one night, and stole a shirt in one place and left it in another, and they were all so connected that the court heard the history of all three burglaries; and Lord Ellenborough remarked that "if crimes do so intermix, the court must go through the detail." (Roscoe's Crim. Ev., 86 *et seq.*) In *Rex v. Ellis* (6 B. and C., 145), the court say: "Generally speaking, it is not competent for a prosecutor to prove a man guilty by proving him guilty of another unconnected felony; but where several felonies are connected together, and form part of one entire transaction, the one is evidence to show the character of the other." (*Pierce v. Hoffman*, 24 Vt. 527; *Bottomley v. United States*, 1 Story, 142-4; 1 Greenl. Ev., sec. 53, note 3; *Baalam, a Slave, v. State*, 17 Ala., N. S., 453; *Dunn v. State*, 2 Ark. 243; *Commonwealth v. Call*, 21 Pick. 522; Dunn's case, Moody's Crown cases, 150; *Rex v. Wylie*, 4 Boss. and Pull., 92; *Rex v. Long*, 6 Car. and P., 383; *Rex v. Mogg*, 4 Car. and P., 555; *Rex v. Egerton*, 1 Russ. and Ryan, 375; *Tharp v. State*, 15 Ala., N. S., 757.)

The judgment and order of the court below are affirmed.

Argument for Appellants.

[No. 824.]

**J. R. COURTNEY ET AL., RESPONDENTS, v. S. TURNER
AND D. P. RICKEY, APPELLANTS.**

WHAT CONSTITUTES ACTUAL POSSESSION OF LAND.—Actual possession of land consists in subjecting it to the will and dominion of the occupant, and must be evidenced by those things which are essential to its beneficial use. The law requires that the extent of the claim should be clearly defined, and that the possession should be open, notorious and continuous.

IDEM—WHEN AGRICULTURAL LAND NEED NOT BE FENCED.—Where the circumstances of the country are such that the fencing of meadow land is not necessary to its beneficial use, and would be ruinously expensive; where it would be against the interests of the occupants and of the public to require it, and where other means as effectual for the protection of the growing crops are provided for by the occupants of the land: *Held*, that the occupants are not obliged to incur the useless expense of fencing in order to hold their land.

IDEM—MARKING OF BOUNDARIES AND EXTENT OF CLAIM.—It is a question of fact whether, in any given case, the limits of a claim are sufficiently defined to advertise the public of its extent.

IDEM.—Where land has been reclaimed from its natural and unproductive state; been drained, leveled, irrigated, and continuously occupied and cultivated for a period of eleven years: *Held*, that any stranger would know (and the defendants having entered upon the land by the permission of the owner did know), that all the meadow land in controversy was occupied and claimed before defendants entered upon it.

ALIEN—RIGHT TO POSSESSION OF PUBLIC LAND.—An alien will be protected in the possession of the public lands, the same as a citizen, against mere naked trespassers who do not connect themselves with the government title.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

The facts appear in the opinion.

T. W. W. Davies, for Appellants:

I. In ejectment, the plaintiff recovers on the strength of his own title, and not on the weakness of his adversary's; and to maintain this action, the defendant must be shown to have been in possession of some part of the land in dispute to which the plaintiff was entitled to the possession at the commencement of the action.

II. The deed to any portion of the unsurveyed public land of the United States government is only operative to

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the extent of conveying so much land as is actually inclosed and in the *possessio pedis* of the grantor, or held by him by virtue of the compliance with the provisions of the possessory act. (*Bird v. Dennison*, 7 Cal. 311; *Wolfskill v. Malajowich*, 39 Cal. 276.)

III. The plaintiffs were not in the actual possession of the land. (*Staininger v. Andrews*, 4 Nev. 66; *Sankey v. Noyes*, 1 Nev. 71.) In this country, where no higher title to land exists than that which the law presumes from possession, and where all persons are permitted to locate upon any public land not previously occupied or appropriated, justice to the community requires that the possession should be open, notorious, and continuous, and it should be a *pedis possessio*." (*McFarland v. Culbertson*, 2 Nev. 280; *Robinson v. Imp. S. M. Co.*, 5 Nev. 44; *Eureka Company v. Way*, 11 Nev. 171; *Plume v. Seward*, 4 Cal. 96; *Sweetland v. Froe*, 6 Cal. 147; *Radshaw v. Treat*, Id. 172; *Murphy v. Wallingford*, Id. 649; *Bird v. Dennison*, 7 Cal. 311; *Wilson v. Corbier*, 13 Cal. 167; *Wright v. Whitesides*, 15 Cal. 47; *Garrison v. Sampson*, 15 Cal. 93; *Cain v. Coryell*, 16 Cal. 573; *Gird v. Ray*, 17 Cal. 352; *Lawrence v. Fulton*, 19 Cal. 690; *Hutton v. Schumaker*, 21 Cal. 454; *Kile v. Tubbs*, 23 Cal. 432; *Hicks v. Whitesides*, 23 Cal. 408; *Polack v. McGrath*, 32 Cal. 15; *Page v. Fowler*, 37 Cal. 112; *Wolfskill v. Malajowich*, 39 Cal. 276; *Crowell v. Lanfranco*, 42 Cal. 655.)

D. J. Lewis, for Respondents:

I. A party in peaceable possession of land who is ousted by one having no title or authority to enter upon the land may maintain ejectment to recover the premises upon his possession merely; and his right to recover cannot be resisted by showing that there is or may be an outstanding title in another, but only by showing that the defendant has title, or authority to enter under the title. (Tyler on Eject. 784; 2 Estee's Pl. 100, 101, 244; 1 Nev. 200.)

II. In the majority of decisions, the acts constituting occupation or possession are laid in the alternative by the disjunctive conjunction *or*, so that either actual occupation or inclosure or cultivation or any other appropriate use to

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which the land might be devoted would be sufficient. The customs of the *locus in quo*, the character and quality of the property, and the uses to which it is applied, or to which its owner or claimant chooses to apply it, are to be considered in measuring title by occupation, the gist of which is that it must be open, notorious, exclusive and continued, when it may be held without actual enclosure. (4 Nev. 68; 3 Washb. Real Es. 3d Ed. p. 1345, subd. 32; *Sabron v. Barnes*, 10 Nev. 240; *McCreary v. Everding*, 44 Cal. 250.)

A fence or an inclosure is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. Other acts may be equally evincive of such an intention. (3 Washb. Real Prop., *ubi supra*.)

If the occupation of the premises by the plaintiffs, their grantors and privies in interest, was open, notorious, continuous and exclusive, ejectment would lie in favor of the plaintiffs for the recovery of the possession of all the land so occupied against any party, except the government, who had ousted the plaintiffs and was detaining from them the possession, use and enjoyment of such premises. The plaintiffs in such case may rely on a paper title and prior possession, and if they fail in the former, they are entitled to recover on proving actual possession at the time of the ouster. (*Morton v. Folger*, 15 Cal. 275.) Settlers who make valuable improvements on public lands which have not been reserved for the exclusive use of the United States, are not trespassers, and such improvements are treated and protected as property by statute in some of the states. (3 Abb. U. S. Dig., new series, p. 577, subd. 22, title Public Lands of the U. S.; *Gaines v. Hale*, 26 Ark. 168; *Staininger v. Andrews*, 4 Nev. 68.)

III. The defendant Rickey occupied the stone cabin at first, as the tenant of the Powells, and with their permission and confessed their title. Occupation by the tenant is the occupation of the landlord, and strengthens the landlord's title. (*Van Valkenberg et al. v. Huff et al.*, 1 Nev. 150; Tyler on Eject. 166, 876.)

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IV. The district court did not err in denying the motion for nonsuit. The plaintiffs having made a *prima facie* case, it was proper to put the defendants on their proofs. (2 Nev. 283 *et seq.*)

J. G. McClinton, also for Respondents:

Argued the case orally, and discussed at length the sufficiency of the testimony to show actual possession and occupancy of the land upon the part of respondents.

By the Court, BEATTY, J.:

This is an action for the recovery of a tract of land. At the close of the trial in the district court the defendants moved for a nonsuit, which motion being overruled, they declined to offer any testimony on their part and the plaintiffs had judgment. Several exceptions to the rulings of the district judge appear in the record, but the only point made in argument by counsel for appellants is, that the testimony for the plaintiffs was insufficient to show any right of possession in them to the demanded premises.

A number of witnesses were examined, whose testimony established the following facts: The land in controversy is situated in Fish Lake valley, in Esmeralda county, a region totally devoid of timber. In the lowest part of the valley there is a narrow strip of meadow land, less than half a mile in width, extending several miles in length, north and south, and bordered on either side by barren sagebrush plains and rocky hills. In its natural state, this meadow land was wet and swampy and unfit for the production of hay. In February, 1865, Moore, Wilds and Dorr caused a survey to be made of a rectangular tract of land a mile long and half a mile wide, embracing a mile in length of this boggy meadow. They had the survey recorded, in attempted compliance with the possessory act (C. L. secs. 78–85), but failed to make the requisite affidavits, and it is conceded that they can claim nothing by reason of their partial compliance with the provisions of that law.

The question is, whether they and their successors reduced the land to their actual possession. The testimony

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shows that after the survey Dorr had nothing more to do with the land. He seems to have abandoned his interest. Moore and Wilds, however, erected a house within the lines of the survey, on the meadow land; near the south end of the tract and resided there until, in 1871, they conveyed to A. Powell and L. B. Powell. The Powells then took up their residence on the land. At the end of a year L. B. Powell went to Canada, where he was residing at the date of the trial, September, 1876. A. Powell, however, continued to reside on the land, holding it for his brother and himself. In January, 1876, he conveyed his interest in the land, an undivided half, to J. R. and E. C. Courtney, who, with L. B. Powell, are the plaintiffs in this action. During the eleven years between February, 1865, and January, 1876, Moore and Wilds, first, and the Powells afterward, continuously resided in the house on the south end of the tract. They constructed a large ditch from one end of it to the other, near the west line of the survey, with which they connected lateral ditches, by means of which the land was thoroughly drained. They found the land too uneven for the operation of a mowing machine, and they leveled it by cutting down the hummucks and filling up the low places. There were some spots too dry to be productive, and they irrigated those through artificial channels. By expending labor on the land to the value of three or four thousand dollars they reclaimed it and made it valuable. From a miry bog, from which the hay could not be gathered, they converted it by their labor into a level meadow, producing an annual crop of two hundred and fifty tons of good hay; and every year they cut and harvested the crop.

In the fall of 1875, in addition to the house originally built by Moore and Wilds on the south end of the tract, and in which A. Powell was residing, there was an unfinished stone cabin standing about the middle of the north half of the tract. Rickey, one of the defendants, who was mining or prospecting in the neighborhood, obtained permission from Powell to occupy this cabin, and Powell furnished a team and wagon and the services of one of his hired men to assist Rickey to put a roof on the cabin and

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make it habitable. Under these circumstances Rickey went upon the land. He occupied the cabin for a short time together with Turner, his co-defendant, and then gave it up to the Courtneys, who also sought and obtained Powell's permission to live there during his pleasure. After the Courtneys moved into the cabin the defendants lived in a tent near by and boarded with the Courtneys, who were working for Powell, baling hay. About this time Turner and Rickey conceived the idea of "jumping" the north half of Powell's land—the half upon which they were residing by his permission. They had heard that L. B. Powell was an alien and was absent from the country; the land was not fenced and there were no stakes or ditches defining the boundary lines; they thought the tract was larger than A. Powell alone had any right to hold, and for these reasons they proposed to the Courtneys to go in with them and "jump" the north one hundred and sixty acres. This proposition was rejected, the Courtneys preferring to purchase from the Powells. This they did, giving A. Powell three thousand dollars for his interest and agreeing to give the like amount for the interest of L. B. Powell when his deed could be obtained.

About this time the Courtneys removed to the house on the south end or half of the tract, in order more conveniently to carry on their work of baling hay. They left a man in charge of the cabin, however, and left some of their household furniture, including a cooking-stove. Shortly afterwards, Turner and Rickey, who had been off prospecting or mining, returned, took possession of the cabin, surveyed the north half of the tract, planted stakes at the corners and have since, until ejected under the judgment in this case, excluded the plaintiffs from the possession thereof. The appellants contend that they had a right to take possession of the north half of the tract because it was never fenced and its boundaries never distinctly marked, and they claimed that these things were essential to an actual *pedis possessio* of this character of land.

The respondents answer that fencing was wholly unnecessary to the enjoyment of the land, and would have been a

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useless expense. This position is fully borne out by the testimony. It was shown that the region of Fish Lake valley was entirely destitute of fencing material; that the valley is isolated in situation and is occupied by a small community of farmers who have established the custom—universally acquiesced in—of driving all live stock out of the valley during the cropping season—that being the cheapest and most effective means of protecting their crops.

As to the marking of boundaries, the testimony showed that Moore and Wilds planted small stakes in mounds of earth, or rocks, at three corners of their survey. These were, of course, wholly insufficient to mark the boundaries so as to advise a stranger of the extent of the claim. But the end lines on the north and south, dividing the Moore and Wilds claim from the claims of subsequent settlers who occupied and improved the meadow lands above and below them, were well known and recognized and respected by the contiguous owners. So far as the neighborhood was concerned, they were notorious, and they were marked, one by two stakes and the other by one. The east and west lines of the survey were longer and, from that circumstance, less defined than the north and south lines. But the east and west lines of the meadow land were clearly defined by the waste, rocky and barren land by which it was bordered. From all the evidence in the case, which is voluminous on these points, it is plain that no man could have gone on these premises and seen the houses, the ditches, the improvements of every kind, and failed to see that all the meadow land for miles in extent was occupied, cultivated and improved. The judgment in this case, it is true, conforms to the survey, and therefore embraces narrow strips of waste land on the east and west sides of the meadow, which were never occupied or improved by either the plaintiffs or defendants. The extent of this waste land included in the judgment is, however, inconsiderable, and it is of no value. No point was made in the court below and none is made here upon the error of the court in including this land. The whole contention is as to whether the plaintiffs had possession of the meadow land; such a possession

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as would support an action against an intruder. We think that there is no doubt that they had.

It has never been decided in this state or, we believe, in California, that a substantial inclosure is essential, under all circumstances to the actual possession of agricultural land.

It was said in *Sankey v. Noyes*, 1 Nev. 71, "What acts are sufficient to constitute such a possession of public land as will maintain ejectment has long been a vexed question in the courts of California, and our own courts have found it impossible to announce any general rules that would meet the varying circumstances of every case. But it seems to be generally agreed that these acts must, in a great measure depend upon the character of the land, the locality, and the object for which it is taken up. While arable or meadow land should be inclosed with a substantial fence, cultivated and improved, land which is only valuable for the timber upon it might be held by a much less substantial inclosure, and cultivation or improvement would not be necessary."

Great reliance is placed by the appellants upon this passage, in the opinion in *Sankey v. Noyes*, as establishing the rule that meadow land must be fenced, in order to reduce it to possession. But even if this language had not been materially qualified by later decisions of this court, it has only to be read in connection with its context to see that the intention of the court was merely to announce a general—not an invariable—rule, illustrative of the principle upon which it is founded. The principle underlying all the definitions of actual possession is this: Actual possession of land consists in subjecting it to the will and dominion of the occupant, and must be evidenced by those things which are essential to its beneficial use. Justice to the community also requires in the circumstances of this country, that the extent of the claim should be clearly defined, and that the possession should be open, notorious and continuous. These were the reasons for the rule announced, that arable or meadow land must be substantially inclosed, and where these reasons fail the rule would not be applied. The reasoning of the same court, speaking by the same judge, in *McFarland*

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v. Culbertson, 2 Nev. 282, bears me out in this position: "The courts of this state have uniformly held that a perfect inclosure of timber land is not necessary. To build a fence that would turn stock would be a perfectly useless act, and one which the courts have never required. If there be an occupation within boundaries so clearly marked and defined as to notify strangers that the land is taken up or located, it is all the possession which the courts of this state have ever deemed necessary to require." The court then proceeded to give the reasons for this—reasons that must always control courts in the application of the rule: "The timber land in this state is usually of no value except for the wood and timber which may be taken from it; no fence would be necessary to subject it to the complete control of a person locating it for that purpose. The land would be as useful without being inclosed by a fence as if it were, whilst arable or farming lands would not. Usually, arable or meadow land can only be subjected to the purposes for which it is most useful by such an inclosure as will turn stock. Hence, the courts have repeatedly held that such lands must be inclosed by a substantial fence; but as the law never requires a vain thing to be done, the courts require nothing more than a distinct marking of the boundaries of timber land and an actual occupation within those boundaries."

Here the reason for requiring the fencing of meadow land is clearly stated: It is because otherwise it could not be subjected to the purposes for which it is most useful. The implication is equally plain that where the circumstances of a country are such that the fencing of meadow land is not necessary to its beneficial use and would be ruinously expensive; where it would be against the interest of the occupants and of the public to require it; where other means as effectual for the protection of the growing crops are provided by the occupants of the land, they would not be obliged to incur the useless expense of fencing. "Actual possession of land is the purpose to enjoy, united with or manifested by such visible acts, improvements or inclosures as will give to the locator the absolute and exclusive enjoyment of it."

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(*Staininger v. Andrews*, 4 Nev. 68; *Coryell v. Cain*, 16 Cal. 573.)

A general discussion of these questions in *English v. Johnson* (17 Cal. 117), is closed by this pertinent inquiry: "If there were no timber or other means of fencing, and no necessity or use for fences in a large district, could there be any sense in holding such acts necessary to protect a possession from intrusion?" But the point under consideration has been expressly decided by this court in a late case: "From the testimony it clearly appears that the plaintiff cultivated at least one hundred and twenty-five acres on his two ranches. There is no testimony showing that it was necessary to inclose the land in order to cultivate it. The plaintiff must be considered as in possession of all the land actually under cultivation." (*Barnes v. Sabron*, 10 Nev. 240.) The same principle is recognized in *Eureka Co. v. Way* (11 Nev. 182).

It is clear that under the circumstances of this case, the plaintiffs were not required to fence their land in order to hold it. But it was due to the public that the extent of their claim should be so clearly defined as to notify new comers. Appellants contend that for this purpose the lines of the survey should have been marked by stakes, ditches or some similar means. These are the means usually employed for defining the boundaries of a possessory claim, but they are not exclusive of other means equally efficacious. It is a question of fact whether in any given case the limits of a claim are sufficiently defined to advertise the public of their extent, and in this case there can be no doubt under the testimony, taking it as true, that any stranger would have known that all the meadow land in controversy was occupied and claimed before the defendants entered upon it. It had been reclaimed from its natural and unproductive state, it had been drained, leveled, irrigated and continuously occupied and cultivated for eleven years by the plaintiffs and their grantors. The defendants entered upon it by their permission, and what everybody else might have known they certainly did know. They knew the meadow lands were cultivated and improved to the edge of the barren

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land on the east and west, and for miles in extent north and south. As to the lines between the contiguous occupants, the appellants might have had no sufficient means of tracing them, but they could not help knowing that all the meadow land between the different houses was occupied. If the plaintiffs and their next neighbors on the north and south had no trouble about their dividing lines, the fact that they were not conspicuously marked does not help the case of the defendants.

As to the alleged alienage of L. B. Powell, it is not clear that he is an alien, but if it were, it would make no difference in this case. An alien will be protected in the possession of the public lands the same as a citizen. Neither can hold as against the government title, but the defendants have not shown, or offered to show, that they have the government title, or that they have taken any steps to obtain it. They are mere naked trespassers upon the possession of one who, so far as the proof goes, has as much right as they have to occupy any portion of the public lands.

The judgment of the district court and its order overruling defendants' motion for a new trial are affirmed.

[No. 818.]

T. M. EMPEY, RESPONDENT, v. O. P. SHERWOOD AND W. H. SHERWOOD, A FIRM DOING BUSINESS UNDER THE FIRM NAME OF SHERWOOD & BROTHER, APPELLANTS.

AGREEMENT TO EXTEND TIME FOR PAYMENT OF NOTES—ASSIGNMENT OF DEBTORS' ESTATE.—Sherwood & Brother, being unable to pay their indebtedness, obtained an agreement from their creditors to extend the time of payment for six and twelve months, and made an assignment of their property to a trustee, who was to control and manage the same for the mutual benefit of the creditors, and to pay the debts *pro rata*, as fast as there was money coming into his hands: *Held*, that after the expiration of one year the creditors could bring their action at law for the purpose of obtaining a judgment for the amount due, the same as if no agreement or assignment had been made.

Argument for Respondent.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The facts appear in the opinion.

Bishop & Sabin, A. B. & W. J. Dougherty, and Ellis & King, for Appellants:

I. It is not a preference or priority to provide that parties in whose favor certain properties are already mortgaged (*Grant v. Chapman*, 38 N. Y. 293), shall have the right to still hold such mortgages. No assignment by the debtor could rob the mortgagee of his protection. And it is only this right that the assignment needlessly attempts to save.

II. When the creditor receives the benefit of the assignment, he cannot afterwards impeach it, but must comply with its provisions. Although it may not appear from the evidence that all the creditors of the Sherwoods assented at the time of the assignment, by the writings in evidence, to the assignment being made, yet the assignment being for their equal benefit, their assent to it is presumed, nothing to the contrary appearing. (*Tompkins v. Wheeler*, 16 Pet. 118-19; *Halsey v. Whitney*, 4 Mason, 206; *Price v. Parker*, 11 Iowa, 144.)

It appears from the evidence that dividends were paid upon the indebtedness; and from the presumption in favor of the regularity of the proceedings of the assignee, we assume that equal dividends were paid upon all of the same character of the demands in this action. Plaintiff must resort to the trust estate for the satisfaction of his demand. (*Frierson v. Branch*, Cent. Law Journal, May 26, 1876.)

John R. Kittrell, for Respondent:

I. The pretended assignment is inadmissible in evidence because it is known to be grounded upon an agreement which never went into effect, nor had any legal existence, and which was excluded from the testimony for such reasons; but which, if it had received validity, would have limited the term of the pretended assignment to one year from date thereof. So in either view, the pretended agreement and assignment were *functus officio*. The pretended

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assignment is upon its face void as not conforming to the statute of the state concerning assignments for the benefit of creditors, and is by that statute declared to be absolutely void. (1 C. S. sec. 464.)

II. It cannot be contended that this statute is suspended by the bankrupt law of the United States, for under universal construction it still exists as a law of the state, and is only suspended in its operation when such operation conflicts with the action of the bankrupt law; this means simply the matter of discharge from indebtedness. (*Dana v. Stanfords et al.*, 10 Cal. 269; *Hastings v. Cunningham*, 39 Cal. 137; *Martin v. Berry*, 37 Cal. 208; *Sturges v. Crowninshield*, 4 Wheat. 122.)

III. The agreement is void also, because there is no time set for the execution of the trust attempted to be conferred upon the pretended assignee. (1 Abb. Dig., sec. 95, p. 288; *Woodburn v. Mosher*, 9 Barb. 255.) Under the proofs and admissions in the answer the assignment is but partial, and therefore void. (1 Abb. Dig., p. 286, sec. 81; *Id.* p. 286, secs. 81–85; *Goodrich v. Downs*, 6 Hill, 438; *Strong v. Skinner*, 4 Barb. 546.)

By the Court, LEONARD, J.:

On the twenty-fourth of March, 1874, and for several years prior thereto, defendants were partners and doing business under the firm name and style of Sherwood & Brother. On the day stated, being largely indebted and owning a considerable amount of property, they and the major portion of their creditors entered into an agreement in writing, of which the following is a copy: "Whereas, O. P. Sherwood and W. H. Sherwood, composing the firm of Sherwood & Brother, are unable at this time to convert their property into coin, so as to enable them to pay the firm indebtedness; and, whereas, said firm have real and personal property amounting to a much larger sum than the total amount of their liabilities; and, whereas, it is deemed ruinous to the community, as well as to said firm, to insist upon immediate payment of said firm's indebtedness; and, whereas, we are satisfied that an extension of

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six and twelve months' time, on the part of the creditors to said firm, will enable said firm to pay all their debts in full; therefore, we, the undersigned, hereby agree to grant an extension to said Sherwood & Brother of six and twelve months from this date, upon the indebtedness due to each of us, provided said firm make an assignment of their property for the benefit of their creditors, and that an agent, to be selected by the creditors, shall have charge and control of the said firm property and business for the benefit of the creditors, said agent to pay the debts due creditors *pro rata*, as fast as there shall be sufficient money in his hands belonging to said firm to justify him, the said agent, in declaring a dividend. This agreement to become binding as soon as it is signed by all the creditors of said firm; and said Sherwood & Brother agree that as soon as their creditors shall consent to such extension of time that they will make an assignment of their property for the benefit of their creditors, the same to be managed and controlled by an agent to be selected for that purpose by the creditors of said firm."

This agreement was dated March 24, 1874, and signed by Sherwood & Brother, T. M. Empey, Antonio Schwartz and other creditors, but was not signed by Steel & Wilson and a few other creditors of Sherwood & Brother.

A few days subsequent to the date of said agreement, by indenture duly executed by Sherwood & Brother of the first part, John H. Rice, trustee or assignee of the second part, and the creditors of Sherwood & Brother of the third part, all the property of the defendants herein, not exempt from execution, was conveyed to said Rice in trust, to be used and sold by him as stated in the assignment, and the proceeds to be paid to the creditors once a month, or as often as it should be expedient so to do, and after the debts were all paid, the residue, if any, to be turned over to Sherwood & Brother. The assignment also provided that if any person not a party to the agreement and assignment should institute legal proceedings against Sherwood & Brother to collect any indebtedness not set forth in schedule No. 2, made a part of the assignment, then the

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agreement and assignment should be null and void, and all parties should be released therefrom, except Rice, who should account to the proper parties for all property or funds in his hands belonging to the estate of Sherwood & Brother.

Rice, the assignee, took possession of all the property assigned, and continued to perform the duties of his trust up to the date of trial.

There was no time stated in the assignment when Rice, the assignee, should bring the duties of his trust to a close; but the assignment and the answer in this action recognize the agreement as the basis of the assignment and a part of it.

For the period of nearly a year after the date of the assignment Rice paid a portion of the creditor's claims, and a part of the several notes upon which this action is brought.

All the notes sued on were executed by Sherwood & Bro. subsequent to the date of the assignment, but about the same time. One was due six months after date, and the other three, twelve months. One was made payable to plaintiff, two to Antonio Schwartz, and one to Steele & Wilson. They were all given for indebtedness that accrued prior to the agreement. Schwartz and Steele & Wilson assigned to plaintiff before the commencement of this action, which is a simple action at law to recover judgment for the amount of the several promissory notes mentioned, and the only question involved is this: Can plaintiff maintain the action, or must he resort to his remedy in equity against the assignee and the trust estate? We think he had an undoubted right to bring this action at the expiration of one year from the date of the agreement.

Steele & Wilson made no agreement to delay the collection of their claim, and Schwartz and plaintiff agreed to extend the time of payment six and twelve months.

After that time they could bring their action at law for the purpose of obtaining judgment, the same as though no agreement or assignment had been made. Whether they could seize and sell the property assigned, in satisfaction of any judgment obtained, is a question that is not involved in this case, and upon that question we express no opinion.

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In *Trotter v. Williamson* (6 T. B. Mon. 38), the court say: "The plea, both in form and substance, is clearly bad. The satisfaction alleged in the plea is no legal bar to the action. It consists in the acceptance, by Trotter, of provisions contained in a deed of trust which had been previously made by Williamson to Haggin, etc., for the payment of sundry debts due from him, among which is the debt of Trotter. The acceptance by Trotter of the provisions of the deed of trust, at most, gave him but an equity in the trust fund, and cannot, therefore, form a legal bar to this action at law against Williamson. The issue to that plea is of course immaterial."

Rice v. Cutlin (14 Pick. 221), was an action of *assumpsit* upon three promissory notes made by the firm of Samuel and John Catlin. At the trial, it appeared that on November 13, 1826, the firm having become embarrassed in their affairs, assigned their personal property to Pliny Ames upon trust, that he should, out of the proceeds thereof, pay the notes in question. There was no express stipulation in the assignment on the part of the creditors. On the seventeenth day of November, 1826, Samuel Catlin made a similar assignment of real estate to three persons named. The plaintiff assented to these assignments and claimed the benefit of them, but did not become a party by executing them. The court say: "Upon inspection of the two assignments referred to, it is obvious that although they purported, among other things, to be made upon trust, to pay over certain proceeds, if any should remain, after the payment of many other preferred debts, to the use of the plaintiffs, in satisfaction of his demands, yet there is no express or implied stipulation on the part of plaintiff to release, discharge or suspend his claims, and nothing by implication of law binding on him, except that he would receive the proceeds when paid, at the hands of the trustees; and it would result as an inference of law that, when received, this payment would extinguish and discharge his debt, either in whole or *pro tanto*, as it should or should not prove sufficient for the purpose. Such being the nature and legal effect of these assignments, they afford no ground of defense to this

Argument for Appellant.

action. The debt being proved, to constitute a good defense, there must be either payment, accord and satisfaction or a release. But a mere pledge or collateral security, not yet productive, from which no actual satisfaction has been realized, is no bar. It may, under certain circumstances, afford ground for a claim on the court, in its discretion, for a delay of judgment, to give reasonable time for the assigned effects to be converted into money and applied according to the terms of the trust."

In *Bank of Bellows Falls v. Deming* (17 Vt. 367), the court say: "We can see no reason for reversing the judgment of the county court. There is nothing in the terms of the assignment which bound the creditors to delay commencing suits. Neither is there any such agreement to delay implied in the fact of the plaintiff's accepting and receiving the amount paid to them by the assignees, as trustees." (*Foster v. Deming*, 19 Vt. 313; *Estabrook v. Messersmith*, 18 Wis. 550.)

The order and judgment appealed from are affirmed.

[No. 847.]

ISAAC BARNETT, APPELLANT, v. D. LACHMAN ET AL.,
RESPONDENTS.

LEGAL TITLE—DEED OF LAND TO T. B. & BRO.—A conveyance of land to Thomas Barnett & Bro. vests the legal title in Thomas Barnett alone, and a conveyance from him will give to his grantees a good and valid title.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts appear in the opinion.

Robert M Clarke, for Appellant:

The deed to "Thomas Barnett & Bro." did not vest the entire title in Thomas Barnett, but vested it in Thomas Barnett and the appellant, his brother. The description of the grantees under the pleadings is sufficiently certain, and under the rules of evidence may be aided by extrinsic evi-

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dence. (1 Greenl. Ev., secs. 288, 325, 326; 22 Mo. 378; 29 Cal. 407; 53 Mo. 334; 29 Wis. 241; 2 Brock. 166-8; 71 N. C. 492; 5 U. S. Dig. N. G. 267, sec. 3.) Any uncertainty is cured by the answer and the proof that Thomas and Isaac Barnett were partners in business at Reno, Nevada, and that appellant is the brother, and only brother, of said Thomas Barnett, residing at Reno.

Thomas E. Haydon, for Respondents:

The deed from Montminy to Thomas Barnett & Bro. conveyed no title to any one but Thomas Barnett. The word "Bro." designates no one. The evidence shows Thomas Barnett has two other brothers besides plaintiff, and there is no certainty in the deed. (*Winter v. Stock*, 29 Cal. 407; *Arthur v. Weston & Strode*, 22 Mo. 378, and numerous cases then cited.) If anything was conveyed to Isaac Barnett under the designation of "Bro." it was simply an equity as a partner in the property, and such equity will not maintain ejectment. (*O'Connell v. Dougherty*, 32 Cal. 458.) Plaintiff alleges a legal title in his complaint, and cannot recover on proof of an equitable title. (*Seaton v. Son*, 32 Cal. 481.)

By the Court, HAWLEY, C. J.:

On the fifth day of June, 1869, one A. Montminy conveyed to "Thomas Barnett & Bro., of the town of Reno, county of Washoe, and state of Nevada," a certain lot in said town. Thereafter, on the eighth day of April, 1871, Thomas Barnett conveyed the same premises to J. G. Becker, and said Becker, on the tenth day of April, 1871, conveyed the property to D. and B. Lachman, the respondents in this case.

This is an action in ejectment commenced on the fifteenth day of April, 1876, by the appellant, Isaac Barnett, to recover the undivided one-half of said premises.

The cause was tried in the court below without a jury, and was there decided in favor of the respondents, upon the ground that the action was barred by the statute of limitations.

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From the pleadings in this case it is admitted that on the eighth day of April, 1871, and for several years prior thereto, the "plaintiff, Isaac Barnett, and Thomas Barnett were co-partners in the business of merchandising in said town of Reno."

It was proven at the trial that Thomas Barnett had four brothers, but Isaac was the only one that ever lived at Reno. It is stated in the findings of fact that the business of the firm was, during its existence, conducted under the names of "Barnett Bro." and "Barnett Bros."

Was the plaintiff, upon these facts, vested with the legal title to an undivided one-half of said premises? This, in our opinion, is the material question presented in this case.

It will, of course, be admitted that the plaintiff had an equitable interest and that, prior to the conveyance of Thomas Barnett, he could have instituted and maintained an equitable action to reform the deed by having his name inserted as one of the grantees therein in lieu of the term "Bro." It will, also, be admitted that he could, after said sale, maintain a suit against Thomas Barnett to compel him to account for one-half of the proceeds derived from the sale of said property. But, in order to enable the plaintiff to support this action of ejectment, he must be clothed with the legal title; and hence the real question here is, as in *Arthur v. Weston*, "whether the partnership style is, as a matter of law, a good name of purchase, in a conveyance of real property, sufficient to pass the legal title to all the individuals of the firm." (22 Mo. 378.)

A conveyance of real property is required to be in writing, and all the authorities hold that the grantee must be identified by name or by description, so as to be ascertained by the written instrument, or it is a nullity, in so far as it attempts or purports to convey the legal title.

It is said in Sheppard's Touchstone, that if the grant be by deed the grantee must be sufficiently named, or at least set forth and distinguished by some circumstantial matter, and that he be so named or described as that he may be capable by that name whereby he is set forth. Regularly, it is requisite that the grantee be named by his names of

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baptism and surname, and so it is most safe; and yet in some cases, though the name be mistaken, the grant is good. As if a grant be to I. S. and Em., his wife, and her name is Emeline; or a grant be to Robert, Earl of Pembroke, when his name is Henry; or to George, Bishop of Norwich, when his name is John. If the grant do not intend to describe the grantee by his known name, but by some other matter there, it may be good by a certain description of the person without either surname or name of baptism. And, therefore, a grant to the wife of I. S., or to the second son, or to the youngest son, will be good, for the person is certainly enough described. “But if a grant be made in these words, viz.: To four of the parishioners of Dale; or * * * to two of the sons of I. S., and he hath many sons, * * * these, and such like grants as these, are utterly void for uncertainty.” (Pp. 235–6–7.)

Appellant relies, among other authorities, upon the case of *Hoffman v. Porter*, where a deed was made to “Peter Hoffman & Son,” and it was admitted that Peter Hoffman was in partnership with his son John, and that the firm was known by the name of “Peter Hoffman & Son;” and Chief Justice Marshall decided that this circumstance was sufficient to designate the son intended in the deed. He took occasion, however, to state that the question was by no means free of doubt. In that case, the son John brought suit against the grantors in the deed to recover damages, in consequence of a defect in the title, under a covenant of warranty; and the justice of the case was so clearly with the plaintiff that the learned chief justice resolved the doubt in plaintiff’s favor, and gave validity to the conveyance. (2 Brock, 156.)

We do not think that the reasoning of that case, when considered in the light of the facts there presented and discussed, is sufficient to authorize us to declare that the deed here in question vested the legal title in Isaac Barnett.

In determining this question it must be distinctly understood that we are not called upon to decide whether it was the intention of the grantor to convey the property to Isaac Barnett; neither are we to decide what interpretation should

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be given to similar language in a description in a devise of real property. The only question presented in this case, as before stated, relates exclusively to the sufficiency of the description in the deed to transfer the legal title so as to enable Isaac Barnett to sustain an action of ejectment.

In *Jackson v. Sisson*, the patent was to “James Parker, William Potter, and Thomas Hathaway, for themselves and their associates, being a settlement of Friends on the west side of the Seneca lake; to have and to hold,” etc. Kent, J., in discussing the question as to the legal title, said: “There was no legal estate created by the patent but what vested in the three patentees named. The description of the association * * * was too vague and uncertain to constitute a competent grantee at law, or a *cestui que use*, whose estate the statute would transfer into possession. (Sanderson on Uses, 62, 128.) * * * But the grant from the state is not to the three patentees named and to their associates. It is to James Parker, William Potter, and Thomas Hathaway, for themselves and their associates, being the settlement aforesaid; and, therefore, from the words of the grant, as well as from the uncertainty of the description, it is evident the associates had only an interest in equity, and that Parker and the others were vested with the legal estate, as trustees for the association.” (2 Johns. Cases, 323.)

But the doctrine upon which this case rests, and the principle upon which it must be decided, is more clearly stated in *Arthur v. Weston*, *supra*, which was, like this, an action of ejectment. The deed in that case was from one Holcomb to W. W. Phelps & Co., and in the lower court the plaintiff offered to prove that at the date of the conveyance from Holcomb to W. W. Phelps & Co., said firm was composed of Phelps, Cowdry and Whitmore, but this evidence was excluded, and the court declared the law to be that the deed to W. W. Phelps & Co. operated to vest the legal title in W. W. Phelps only. The supreme court, in sustaining the ruling and decision of the lower court, said: “We repeat, the only question in the present case is whether the description the deed gives of Phelps, Whitmore & Cowdry

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is of 'that certainty which the law will allow to be tried,' so as to constitute these persons competent grantees in a legal conveyance of real property. The objection here is not to the admission of the parol proof merely as such, for such evidence is admissible, to some extent, to determine the application of every written instrument. It is always received to show the correspondence of the parties claiming and the thing claimed, with the description given of them in the deed. The descriptive matter, whatever it may be, must be in the deed or in some other written instrument to which the deed refers; but the evidence that a particular person or thing answers to the description is necessarily by parol. To this extent we must always look outside of the instrument to ascertain what is meant by it. Neither does the objection here turn merely on the fact whether or not it be possible, by means of the description, to ascertain the persons intended. That was possible in several of the cases referred to, especially in the New York case (alluding to *Jackson v. Sisson, supra*), for the judge there admits that, although the description given would be insufficient as a legal description of the persons to take as the grantees of the legal estate, they were yet sufficient to create a valid trust in favor of the same persons, and that under the instrument the three grantees held the legal estate in trust for their associates. In a case from Maine (*Beoman v. Whitney*, 20 Me. 420), this question as to the effect of a deed to Whitney, Watson & Co., came up collaterally, and the court said: 'Who Whitney and Watson were is well known, and was proved in the case. If the other persons embraced under the general term, Company, could not take as grantees, Whitney and Watson, who were named, could, and thus they would hold for themselves and in trust for those associated with them, and this is sufficient to give operation to the conveyance.' By reference to the adjudged cases, it is seen what matter of description the law deems equivalent to a proper name in designating the parties to a conveyance. In all of them it was of those particulars by which the persons were quite as well known in their neighborhoods as by their proper names, and which, of course, were of as easy proof;

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and in some of them the parties were better known by the description than by their names. Such, however, we do not think is the character of the present descriptive matter. There may be, and no doubt are, many cases in which persons would be quite as readily known in their neighborhoods by their partnership's style as by their proper names; but it is quite evident that in other cases, especially if the partners were numerous, or any of them were dormant, it would be a matter of no little trouble, and of a good deal of uncertainty at least, to ascertain who were the persons that really took under the description. It is a matter of great interest to the country that its land titles should be kept as free as possible from uncertainty. For this purpose, the law has required them to be put in writing; and, in order to give them publicity, has also required that they be put upon a public registry. That these provisions may be effectual for the purposes for which they were intended, the rules of the common law, as to the designation of the parties, must be maintained in their vigor. None of the adjudicated cases go to the length that we are now asked to go, and we think the public good forbids such a relaxation of the common law rules upon this subject."

This decision is followed in *Gossett et al. v. Kent* (19 Ark. 607), and *Winter v. Stock* (29 Cal. 407), and, in our opinion, it would be unsafe to depart from the rule therein announced.

It may be true, as was argued by appellant, that the term "Bro." is not usually as uncertain as "Co." It would seem to limit the inquiry as to which brother was meant, and if there was only one brother it might be said that there was no good reason why such brother should not take the legal title. But, in reality, the term "Bro." may be just as uncertain as "Co." It is not uncommon, we believe, after a firm name has been once established, for other persons than the original partners coming into the firm as partners to continue business without any change in the firm name. But, be this as it may, it is quite evident that it would be unsafe to hold that a purchaser of real estate is

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bound to ascertain who the partners composing the firm are. If such a rule should be adopted it would have a tendency not only to create uncertainty in the transfer of real property, but would open wide the door for the commission of fraud. There is no law in this state compelling persons transacting business under a firm name to publicly disclose the names of the individuals composing the firm. Now, if the rule contended for by appellant should be adopted, the purchaser of real property from the alleged copartners would never be secure. To illustrate: The purchaser examines the record and finds a conveyance to "A. B. & Bro." It is generally understood in the community that "C. B." is the "Bro." composing said firm. The purchaser, upon being so informed, takes the deed from A. B. to C. B. Before the statute of limitations expires another brother of A. B. comes into court with an action against the purchaser, and claims that he is the "Bro." designated in the deed, and he proves, by clear and positive evidence, that he is the real brother that was a member of the firm at the date of the execution and delivery of the deed, and that his other brothers had falsely misrepresented the facts to the purchaser. What security would the purchaser have in such a case? None whatever. The fact, relied upon by appellant, that the deed in this case is made to T. B. & Bro. of Reno does not give to the deed any greater degree of certainty. The name, "T. B. & Bro.," is the firm, and does not necessarily, or even by implication, allude to the brother that resided at Reno.

It may have been, for aught that appears in the deed, that T. B. employed his brother Isaac as a clerk, and yet during all the time of the copartnership, the "Bro." who was a member of the firm, may have lived at New York or Paris.

The law ought not, and it does not, sanction any rule which would be susceptible of so much doubt and uncertainty, independent of its evident tendency to encourage fraud and perjury. In any event it must be acknowledged that the doctrine contended for by appellant would surely tend to destroy the security of titles to real property, and ought not to be upheld.

Points decided.

Entertaining the opinion that Isaac Barnett never had the legal title to the premises, it is unnecessary to decide the question whether this action was barred by the statute of limitations.

The judgment of the district court is affirmed.

[No. 835.]

THE STATE OF NEVADA, RESPONDENT, v. AH MOOK,
APPELLANT.

CRIMINAL LAW—TRANSCRIPT ON APPEAL.—The Supreme Court, in the examination of the transcript on appeal in a criminal case cannot look at anything contained therein that is outside of the record provided for by statute.

CHARGE OF THE COURT MUST BE EMBODIED IN A BILL OF EXCEPTIONS.—The charge given by the court of its own motion is not a part of the record unless it is included in the bill of exceptions.

DUTY OF CLERK IN PREPARING RECORD.—The papers that constitute the record or judgment roll in a criminal case, are specified in volume 1, Compiled Laws, 2075, and it is the duty of the clerk to fasten them together and file them within five days after the entry of a judgment of conviction.

IDEM—BILL OF EXCEPTIONS.—It is the duty of the clerk to attach the bill of exceptions to the rest of the judgment roll before it is filed, just as it was left by the judge who signed it. He must not add to it, or subtract from it, anything whatever.

HOMICIDE—INSTRUCTIONS RELATING TO MURDER.—The court, at the request of the prosecution, instructed the jury "that the true difference between simple murder (or murder of the second degree) and murder of the first degree, under our statute, does not consist in the length of time the assailant must have deliberated, but whether he had at or before striking the fatal blow or firing the fatal shot formed the design to slay the deceased. If such design was formed, however recently, it will be murder of the first degree:" *Held*, that when read in connection with the other instructions it could not have prejudiced the defendant.

IDEM.—The court, at the request of the prosecution, also instructed the jury "that the premeditation or intent to kill need not be for a day, an hour, or even a minute, for if the jury believe from the evidence there was a design, a determination to kill, distinctly formed in the mind at any moment before or at the time the pistol was fired, it was a willful, deliberate and premeditated killing, and therefore murder in the first degree:" *Held*, ambiguous but not necessarily erroneous, and that when read in connection with a proper instruction defining manslaughter, it could not have prejudiced the defendant. (HAWLEY, C. J., *dissenting*.)

Argument for Appellant.

IDEM—MEANING OF DELIBERATION.—The words “a design, a determination to kill, distinctly formed in the mind,” in their natural sense imply deliberation. (HAWLEY, C. J., *dissenting*.)

IDEM—INSTRUCTIONS ON SAME POINT, HOW CONSTRUED.—Where two instructions are given on the same point, one clearly and unequivocally correct, the other ambiguous and susceptible of two constructions, according to one of which it is correct, but according to the other of which it is erroneous, as it is the duty of the jury to read and consider all the instructions together they will put that construction upon the doubtful one which makes it consistent with the other, and reject that construction which brings the two in conflict.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The facts are sufficiently stated in the opinion of the court.

Lewis & Deal, for Appellant.

I. The instructions in this case are erroneous from beginning to end; and we venture the assertion that no jury could possibly have heard them without being misled. (The points made by counsel as to errors in the charge of the court of its own motion are omitted, because said charge is not considered by the court.) The law always presumes injury from an error, unless it is perfectly manifest it could not have that effect. (*State v. McGinnis*, 5 Nev. 337; *State v. Parsons*, 7 Id. 57; *State v. Van Winkle*, 6 Id. 340.)

A person may unlawfully, feloniously and deliberately kill another, and the homicide be only manslaughter. (10 Mich. 212; 2 Bishop Cr. Law, 676.) If there be provocation sufficient, a man may kill another deliberately, and still the offense would only amount to manslaughter.

II. The first instruction asked by the prosecution is incorrect, because it virtually ignores deliberation, which is an element of murder in the first degree under our statute. Now, deliberation indicates a process of the mind antipodal to that described in the instruction; it conveys the idea of time taken to arrive at a conclusion; that the determination was arrived at after reflection and thought, and excludes the conclusion that the legislature intended a hasty and inconsiderate decision. But, under this instruction, the jury are charged that, no matter how hasty or inconsiderate the

Argument for Respondent.

determination, the homicide would be murder if there was an intent to kill.

III. Instruction number two ignores all the defense of the defendant, and directly tells the jury that if the defendant intended to kill Ah Long, it was a willful, deliberate and premeditated killing. Now, whilst the jury may have believed that the defendant intended to kill Ah Long, they may have also believed that he acted under great provocation; but under this instruction they could not consider such a fact, but were compelled, if the killing was intentional, to convict of murder in the first degree. The charge and instructions, from beginning to end, were given under a gross misunderstanding of the law.

John R. Kittrell, Attorney-General, for Respondent.

I. The charge of the court, given of its own motion, cannot be considered, because not embodied in the bill of exceptions. (*State v. Baker*, 8 Nev. 146; *State v. Forsha*, 8 Nev. 139; *State v. Burns*, 8 Nev. 255; *State v. Darling*, 4 Nev. 413.)

II. Instruction, not one asked by the prosecution, was intended to apprise the jury of the distinction existing between murder in the first and murder in the second degree. While it does not contain as full and as complete a definition of the difference between the two degrees of murder as it might, still the substantial distinction is set forth. It is tantamount to informing the jury that murder in the first degree consists in a deliberate and specific intention to take life, and that where there is an absence of such intent, that it is murder in the second degree; provided, that nothing was wanting to make the crime murder in the first degree, save the intent previously formed to take life.

For a full discussion of what is murder in the first, and what is murder in the second degree, see Whar. C. L., 2d ed. 170, *et seq.*; *Commonwealth v. Green*, 1 Ash. 289; *Commonwealth v. Murray*, 2 Ash. 43; *Commonwealth v. Keeper*, 2 Ash. 227; *People v. Bealoba*, 17 Cal. 389. These suggestions also apply to instruction two.

III. There is nothing in the defendant's testimony which

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tends to reduce his crime from that of murder to manslaughter. His testimony shows that he fired the fatal shot prompted by deliberate revenge, and not in the heat of blood. This is murder. (*Rex v. Thomas*, 7 C. & P. 817; *State v. Yarbrough*, 1 Hawks, 78.)

The law assigns no limits within which cooling time may be said to take place. Every case must depend on its own circumstances; but the time in which an ordinary man, in like circumstances, would have cooled, may be said to be the reasonable time. (*State v. McCants*, 1 Spear's, 384; 7 Jones N. C. 206.) For authorities bearing more or less upon the question of provocation and cooling time, see 6 Iredell, 164; 18 Mo. 419; 8 Car. & Payne, 182; 6 Black. 299; 18 Ala. 720; 7 Car. & Payne, 142; 20 Mo. 58.

By the Court, BEATTY, J.:

The defendant in this case appeals from a conviction of murder of the second degree. The principal point made in support of the appeal is that the district court erred in its charge to the jury. But there is nothing in the record to show what the charge of the court was. All that is stated in the bill of exceptions is that "the court then, after argument by counsel, gave to the jury the instructions herein of record, marked plaintiff's instructions, numbers 1, 2 and 3, and instructions of its own motion." In *The State v. Huff* (11 Nev. 22), we commented upon and condemned the practice of referring to loose papers on file in the case instead of incorporating them in the bill of exceptions; but in that case, in the absence of any objection on the part of the state, and because of the fact that all the original papers had been destroyed by fire, we consented to treat the document in question as a part of the record.

Here, however, the objection is taken and urged that the paper copied into this transcript as the charge of the district court, given of its own motion, is not a part of the record, and cannot be considered.

The objection, in our opinion, is well taken. We can look at nothing outside of the record (C. L. 2105), and the charge given by the court of its own motion in a criminal

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case is not of itself a part of the record, and can only be made so by being included in a bill of exceptions. (C. L. 2051, 2075; *State v. Forsha*, 8 Nev. 139.) A bald statement, that the court charged the jury of its own motion, does not make the charge so given a part of the bill of exceptions, but merely puts upon record the fact that the court did give an instruction which was not asked. If that fact is all that the party desires to have appear, then his bill of exceptions is sufficient; but if his object is to avail himself of some supposed error in the charge, the charge itself must be put upon record.

Now, it is perfectly apparent that the legislature never intended that the record in a criminal case should consist of a bundle of loose papers. The papers that are to constitute the record or judgment roll are specified in the statute (C. L. 2075), and it is made the duty of the clerk to fasten them together and file them within five days after entry of a judgment of conviction. The bill of exceptions is one of the papers to be so fastened to the rest of the judgment roll before it is filed; but it is no part of the clerk's duty, and he has no right to read the bill of exceptions and attach to it, or copy into it, the papers and documents which he may consider are referred to. All he has to do with the bill of exceptions is to attach it to the rest of the record before that is filed. He can neither add to nor subtract from it, but must leave it as it was left by the judge who signed it. If, then, it refers to other papers that are no part of the record, those papers are not bound up in the judgment roll. They remain as they were before, loose, disconnected, unauthenticated, liable to loss, alteration or substitution. It may be that in practice these evils would never be experienced, but the legislative will has been clearly expressed that the record of a conviction in a criminal case shall be made up, authenticated and preserved in a particular mode. There is nothing unreasonable in the statutory requirements, and they ought to be adhered to. If they are adhered to there will be no room for question as to what is and what is not of record; but if they are disregarded, questions may arise as to the genuineness of documents referred

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to in the bill of exceptions, and when such questions can be avoided they clearly ought to be.

The instructions which the court gave at the request of the prosecution are, however, a part of the record (C. L. 2011, 2012, 2051, 2075), and it is claimed that the following were erroneous:

“No. 1. The jury are instructed that the true difference between simple murder (or murder of the second degree) and murder of the first degree, under our statute, does not consist in the length of time the assailant must have deliberated, but whether he had, at or before striking the fatal blow or firing the fatal shot, formed the design to slay the deceased. If such design was formed, however recently, it will be murder of the first degree.

“No. 2. The jury are instructed that the premeditation or intent to kill need not be for a day, an hour or even a minute, for if the jury believe from the evidence there was a design, a determination, to kill distinctly formed in the mind at any moment before or at the time the pistol was fired, it was a willful, deliberate and premeditated killing, and therefore murder of the first degree.”

In order to a clearer comprehension of the points made in reference to these instructions a brief recital of the substance of the testimony will be necessary.

According to the testimony for the state the defendant shot and killed another Chinaman while he was under arrest in the hands of an officer, and just as he was being carried into jail. The defendant, testifying in his own behalf, admitted the killing, but stated that a very short time previous thereto he had witnessed an altercation between the deceased and his (defendant's) brother, which ended in the shooting and wounding of his brother by the deceased; that he had asked the deceased why he shot his brother; that the deceased replied that it was none of his business, and that if he did not look out he would kill him, too; that he (defendant) thereupon stepped into his house, thirty feet distant, and armed himself with a pistol; that he came out, saw the deceased pursued and captured by the officers, intercepted him at the door of the jail and shot him. It was

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a clear case of a voluntary and unlawful killing on the defendant's own statement of the circumstances, and the only question was as to the degree of his guilt, whether murder of the first degree, murder of the second degree, or manslaughter. It seems to have been conceded in the district court, on all sides, that the provocation (seeing his brother shot by deceased) was sufficient in law to mitigate the crime of defendant to manslaughter, provided he acted under the impulse of passion and before the expiration of reasonable cooling time, and the instructions asked by the defendant and given by the court cover these points. The following is one of the instructions so asked and given:

“The jury are instructed that the killing of a human being upon sudden heat of passion, caused by a provocation sufficiently strong to make the passion irresistible, the killing is manslaughter, and not murder, provided that sufficient cooling time did not intervene between the provocation and the killing for the voice of reason to be heard. The law assigns no limit within which cooling time may be said to take place. Every case must depend on its own circumstances, and if you find from the evidence in this case that the defendant, upon sudden heat of passion, caused by provocation sufficiently strong to make the passion irresistible, and that sufficient cooling time did not intervene, you will find the defendant guilty of manslaughter.”

It is evident that a clerical mistake has occurred in the copying of this instruction, but it shows clearly enough that the jury was instructed in language of his own choosing, and in terms quite as favorable as the law warrants, that the defendant was only guilty of manslaughter, if he acted under the impulse of passion, caused by a sufficient provocation, and before the intervention of reasonable cooling time. He can certainly have no fault to find as to the manner in which the law of voluntary manslaughter was laid down. And if the jury attended to this instruction, and understood its meaning, we must conclude that in convicting him of murder in the second degree, they decided, as a matter of fact, either that he had never been impelled by passion, or that it had had time to subside before the shooting. The

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testimony in the case would have well warranted either finding. From the defendant's own account of the transaction, he appears to have proceeded with the utmost coolness and deliberation throughout, and there was other testimony strongly tending to negative the existence of uncontrollable passion at the time of the shooting.

This made it proper for the prosecution to ask the court for instructions, based upon the hypothesis that, at the time of the shooting, the defendant's mind was free from passion and under the dominion of reason; and it is upon that hypothesis that the two instructions first above quoted are evidently based. They are not to be read by themselves, but in connection with each other and the rest of the charge. So read, we do not think they can have prejudiced the defendant.

Taking the second one alone, out of its context, it will, perhaps, bear the construction which defendant puts upon it; and whether a lawyer would or would not understand from it that a bare intent to kill makes the killing murder, it is certainly not improbable that a jury might understand it in that sense. Of course, if a jury were so instructed in a case like this, it would be error. It requires something more than a bare intent to kill to make a killing murder in any degree. In all cases of voluntary manslaughter, such as defendant contended this was, there is an intent to kill. But it is supposed in such cases that the slayer is incapable of exercising his reasoning faculties on account of the predominance of passion, and it is therefore said that there is no deliberation and no malice aforethought. In order that the intent to kill may constitute express malice, it must be formed in a mind free from irresistible passion and capable of reason. If, instead of this, the intent to kill is the result of a mere blind impulse of passion, the killing cannot be murder in the first degree, and will not even be murder in the second degree unless the passion was caused by an insufficient provocation or a reasonable cooling time had elapsed before the killing. Therefore, we say again, that if the jury in this case had been instructed that a bare intent to kill on the part of the de-

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defendant made his crime murder, the instruction would have been erroneous, and the judgment ought to be reversed. But we do not think the instructions complained of, read in connection with the rest of the charge, could have been so understood. They undertake to state the distinction between murder of the first and murder of the second degree. In another instruction, the jury are told that if there was sufficient provocation, irresistible passion, and no sufficient cooling time, the defendant is only guilty of manslaughter. But suppose there was no passion sufficient to overpower the reason, or suppose a reasonable cooling time had elapsed before the killing? This hypothesis is not expressed in the instructions, but is implied, and on such hypothesis they do not misstate the law, at least not in a manner that could possibly have prejudiced the defendant. The expressions which occur throughout the instructions, such as "premeditation," "deliberation," "design, determination, distinctly formed in the mind," all imply the absence of overpowering passion, so that the instructions really mean this: If the defendant, instead of being impelled by passion was impelled by deliberate revenge—if he was under the control, instead of being beyond the control, of his reason—it matters not how instantaneously he may have acted upon the design to kill, he was guilty of murder in the first degree.

If this was the meaning of the instructions, and read in connection with the instruction in regard to manslaughter, we think they must have been so understood; then they stated the law applicable to this case correctly. If a killing is unlawful, and if there was a design to kill distinctly formed in the mind of the slayer—if the intent to kill existed in a mind controlled by reason and not impelled by passion—an instant before striking the fatal blow, the killing is murder of the first degree. The time a man deliberates is wholly immaterial. The question is: has he deliberated at all? and whether he has or not depends solely upon whether his mind, at the moment of such intentional killing, is or not under the dominion of reason. If he is capable of deliberation his intent to kill must be

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deliberate, and there is express malice. This doctrine is elementary. The text-books are full of it, and all the authorities sustain it.

We wish to say, however, in conclusion, that we do not approve these instructions as models to be followed hereafter. The most that can be said in their favor is that in this case they did not prejudice the defendant. The first appears to have been drawn from the opinion of the chief justice in Millain's case. The language of that opinion was proper enough in the connection in which it was used, but it is neither a full nor a perfectly clear statement of the distinction between the two degrees of murder, and there are many cases in which it would be confusing, if not absolutely erroneous. The second is still more objectionable. Its meaning is not clear, but ambiguous and indefinite. It is susceptible of a construction according to which it would be erroneous, and, but for the clear and definite instruction on the subject of voluntary manslaughter by which it was accompanied and qualified in this case, must have been so construed.

The judgment of the district court is affirmed.

HAWLEY, C. J., dissenting:

With that portion of the opinion of the court which decides that the instructions given by the court of its own motion cannot be considered, because not embodied in the bill of exceptions, I fully concur.

I also agree with the court that instruction number one given at the request of the prosecution, does not correctly state the true rule between murder of the first and murder of the second degree. But I dissent from some of the views expressed by the court relative to instruction number two.

In this case it is very properly admitted by the attorney-general and by the court that the second instruction, standing alone, is ambiguous and susceptible of an erroneous construction. This being true, upon what hypothesis can it be considered as correct? In what portions of the other instructions are any words to be found which qualify, relate to, or in any other manner explain the language or cover

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the principle of law intended to be contained in this instruction? Can we interpolate qualifications that do not anywhere appear in any of the instructions given? It seems to me that if any effect is to be given to the language used, as expressing the intention of the court giving it, it means just what it says and nothing else.

Admitting that the instruction relating to voluntary manslaughter was proper, yet neither in it or elsewhere is there any attempt to draw the line distinguishing murder from manslaughter. The jury was not told that if the defendant was not controlled by passion, but was impelled by deliberate revenge, or if he was under the control of his reason, then if he had formed the deliberate design to kill, even for an instant, it was murder in the first degree; nor in my judgment can any such meaning be reasonably implied from the language of the instruction. On the other hand, it does appear to me that the jury was in effect told that notwithstanding the facts stated in the instruction defining manslaughter, yet, to quote the language of the instruction, "if the jury believe from the evidence there was a design, a determination, distinctly formed in the mind at any moment before or at the time the pistol was fired, it was a willful, deliberate and premeditated killing, and therefore murder in the first degree." This is not the law. When the facts of a homicide clearly show that the killing was done with an intent to take life, and the act of killing is not accompanied by any circumstances of justification, extenuation or excuse, as recognized by law, then the act of killing would be murder, and in such a case the deliberate and premeditated intent to kill need not, in order to make it murder of the first degree, have existed for any given length of time, it being sufficient that such intent actually existed before the commission of the act from which death ensued. "But," as was said by Christiancy, J., in *Maher v. The People*, "if the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the tempo-

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rary excitement by which the control of reason was disturbed rather than of any wickedness of heart, or cruelty, or recklessness of disposition, then the law, out of indulgence to the frailty of human nature, or rather in recognition of the laws upon which human nature is constituted, very properly regards the offense of a less heinous character than murder, and gives it the designation of manslaughter." (10 Mich., 219).

It does not appear in any of the instructions presented by the record, that the jury was informed that, if the act of killing was intentional, the offense might, nevertheless, be reduced to manslaughter, if committed "upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible." (1 Comp. L. 2324.) The distinction between murder and manslaughter does not depend upon the question whether there was an intent to kill. (2 Bish. on Cr. L. 676; Lewis, U. S. Cr. L. 396; *Dennison v. The State*, 13 Ind. 510; *Maria v. The State*, 28 Tex. 698; *People v. Freel*, 48 Cal. 436.) "Whether the homicide amounts to murder, or manslaughter merely," to quote the language of Niles, J., in the case last cited, "does not depend upon the presence or absence of the intent to kill. In either case there may be a present intention to kill at the moment of the commission of the act. But when the mortal blow is struck in the heat of passion * * * the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter. In such a case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder."

In the absence of any explanation as to the difference between murder and manslaughter in cases like the present, where there is an intent to take life, it does not appear to me that the jury could have understood the instruction in any other sense than that which its language imports. It may be that the evidence in this case would have justified the jury in finding the defendant guilty of murder in the first degree, but there was evidence tending to show that the act of killing was the result of a sudden and violent impulse

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of passion, produced by an adequate provocation, sufficient to reduce the degree of crime to manslaughter, and hence the defendant was entitled to have correct instructions given upon this point; and having been convicted of murder in the second degree, the error in the instruction was, in my opinion, of such a character that it may have misled the jury to the defendant's prejudice.

I differ from the court in its conclusions that the words "premeditated," "a design, a determination, to kill, distinctly formed in the mind," as used in the instruction, were sufficient to inform the jury of the distinction which it is claimed was intended to be made by the court below. The word "premeditated" is used as synonymous with "intent," and hence, in determining what was meant, we must leave it out, and there is no other word or expression in this instruction which necessarily implies "deliberation and malice aforethought," without which the offense of murder in the first degree cannot be established. The legal definition of the word "intention," according to Bouvier, is "a design, resolve or determination of the mind," so that in the legal, as well as ordinary signification of the words, the jury may have understood the instruction to mean: That if there was an intent to kill at any moment before or at the time the pistol was fired, "it was a willful, deliberate and premeditated killing, and therefore murder in the first degree." In this case, although there was an intention to kill, yet if the jury believed from the evidence that the killing was "without malice, express or implied, and without any mixture of deliberation," the crime was only manslaughter. (1 Comp. L. 2324.) It is not, perhaps, necessary that the court should give instructions embodying all the distinctions between the different degrees of crime. As long as the court gives correct instructions, the defendant cannot complain. If he wishes more explicit instructions, he must prepare them, and ask the court to give them. I agree with the court, that when the instructions, construed together as a whole, clearly set forth the law of the case, an ambiguity in some portion thereof will not necessarily vitiate the verdict. But when an error does clearly appear

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in an instruction given by the court, and the error has not been cured by other instructions, it must in some manner affirmatively appear that the defendant could not have been prejudiced by the error. In my opinion it does not so appear in this case.

I think the judgment ought to be reversed.

A rehearing was granted in this case at the request of counsel for appellant, to enable them to fully argue the points upon which they relied for a reversal. In the petition for a rehearing, counsel for appellant, among other things, contended that the second instruction discussed in the opinions was a flagrant violation of the law; that it was not cured by any other instruction; that there were no other instructions which either modified or added to it; that it was an attempt to define murder, and that the instruction referred to by the court is one defining manslaughter. That the jury, after reading this instruction, if they were of the opinion that the defendant had formed a design to kill at any time before the fatal act, might have then stopped and found the defendant guilty of the higher offense without disregarding the definition of manslaughter in instruction number three, because in instruction number two the entire proposition is that if the design is formed before the killing, then the crime is murder. The jury accept that as a fact to control them; there is no qualification of it, no modification. It is a statement of an abstract legal proposition, to hold good in all cases. In other words, the test whereby to determine whether the offense be murder or manslaughter is, was there a distinct design formed to kill before the fatal act? That the instruction means nothing else, and cannot mean anything else, with any kind of regard for the use of language. The jury, being so instructed, may have found the defendant guilty of murder, provided they believed such design did exist or was formed, and they could have so concluded without doing violence to the instruction defining manslaughter, because instruction number two is to the effect that, if there be a design to kill, then the killing is murder, while the manslaughter

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defined by the judge may be a killing upon a provocation without any such preconceived design, and a jury simply looking to the language in which they were instructed could come to no other conclusion.

Upon a rehearing the following opinions were filed at the October term, 1877:

By the Court, BEATTY, J.:

It is a subject of regret with the court that counsel for appellant did not avail themselves of the opportunity of a rehearing to elaborate their views of this case in an oral argument. The rehearing was ordered, not because we were convinced by the arguments advanced in the petition that our former decision was erroneous, but because, on account of the division of opinion in the court and the suggestion of counsel that they had been misled by the absence of the attorney-general at the time the case was first argued, we were desirous of affording them an opportunity to reply to the points made by the attorney-general and to convince us of our error, if we had committed one. They have chosen, however, to resubmit the case on their original brief, and their petition for a rehearing—assuming that the questions involved are too plain to admit of a difference of opinion, and that our former decision was the result of inadvertance and want of consideration. Counsel are mistaken in supposing that the case was decided without full consideration of all the points of their argument, or without a thorough knowledge of all that is contained in the record. The views of counsel are, in the main, those which were adopted in the dissenting opinion of the chief justice, and the fact that he differed with the other members of the court led to a thorough reconsideration of the majority opinion before it was filed. Upon such reconsideration we were satisfied, as we still are, that the decision was correct. We have only to regret that we did not modify one or two unguarded expressions in the opinion, which have led to a misconception of its meaning. We think that on a careful reading it ought not to be misunderstood; but, since it has been misunderstood by counsel for appellant, we are glad of the opportunity to restate our position more clearly, if we can.

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We will, however, before adverting to the point as to which we have been misunderstood, pay some attention to other matters dwelt upon in the petition for rehearing.

Vigorous exception is taken to the opinion imputed to the court that the verdict in this case was a proper one. Counsel "protest that there is no case on record where a man was convicted, by an impartial jury, of murder upon the facts developed in this case." They "can account for the verdict upon no hypothesis except that it was the result of hatred of Chinamen, with the fear of newspaper censure, together with the bold and glaring misstatements of the law by the court below." They assert that "the evidence all through shows that the defendant was acting under the most uncontrollable passion, induced by an act that would have impelled any rational being to do what he did."

"Let us suppose," they say, "that a white man finds his brother shot down in cold blood. He addresses the murderer immediately upon the perpetration of the act, and the only answer he gets is a threat against his own life. If, under such circumstances, he should immediately procure a weapon and kill the murderer of his brother, will any one say that such a man is guilty of murder? We venture the statement that no jury in creation would convict him of any such crime, and ninety-nine out of a hundred would unhesitatingly acquit him altogether, and yet this court say that the jury in this case properly convicted this defendant. We cannot believe that the court has read the evidence with that care that it should."

This vehemence of statement is perhaps not unbecoming, and at all events is pardonable, in counsel, whose sympathy for their client in cases of this character may always be expected to cloud their judgment to a greater or less extent, but we must be allowed to protest that we expressed no opinion as to the propriety of the verdict in this case. All we said, and all we were called upon to say, was that, under the testimony, which would have well warranted the jury in finding either that there was no uncontrollable passion or that there was cooling time, it was proper for the court to give instructions based upon that hypothesis. We venture

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still to adhere to that opinion, and should do so even though the testimony for the defense had been as strong as counsel represent it. A *prima facie* case of murder was proved. The court could not assume that the jury would believe the testimony as to mitigating circumstances, but, on the contrary, had to assume, in giving its instructions, that, on the question of sufficient provocation or reasonable cooling time, the finding of the jury might be against the defendant. So the point decided would have been correctly decided if the testimony had been such as counsel imagine it to have been. But in truth the case bears a very slight resemblance to the version of it which we have quoted from the petition for a rehearing. We should be sorry to be understood as saying that this verdict—murder of the second degree—was exactly the proper one. What we said, and what we repeat is, that the evidence warranted a graver verdict. The defendant did not “find his brother shot down in cold blood.” He and his brother were in the street in front of Ah Long’s house. His brother was assailing Ah Long with the foulest and most abusive epithets, and challenging him to come out. He came out, not in cold blood, but in response to challenges and insults. He shot at defendant’s brother, but there is no testimony that he brought him down, or even injured him seriously. All we know is that it was a flesh wound. Ah Long, then, was not the “murderer” of defendant’s brother, and his conduct was not unprovoked. If we were to adopt the notions of counsel, that the law ought to be made to fit the verdicts that the juries of the country have found, or would or would not find, we might even say that Ah Long was justified; for we are not without experience in this state of verdicts of acquittal under circumstances quite as unfavorable to the defendants as these were to Ah Long.

The defendant did not kill Ah Long “*immediately*.” He was not seized with a sudden, uncontrollable impulse to slay. He did not rush off at once to procure a deadly weapon, but stopped to ask Ah Long why he had shot his brother. On receiving a threatening answer, he went and got his pistol for the purpose, he says, of shooting Ah Long

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“if he saw him.” On this testimony alone it would have appeared that he got his pistol, not as a means of gratifying an impulse of passion, but as a measure of precaution or means of revenge. But his subsequent conduct is still more significant. Did he start in headlong pursuit of Ah Long, impelled by overmastering passion to seek his life, and oblivious of everything else? He did the very opposite. He saw the police capture Ah Long, gave up the pursuit himself without going near him at that time, and went for a surgeon to attend his brother's wound. His passion was so far under his control that he could suspend the gratification of it until his brother was provided with a surgeon. This circumstance alone negatives the idea of irresistible passion, for unless counsel are going to contend—and it would be suicidal to do so—that he calculated upon getting a surgeon for his brother and getting back to the jail in time to intercept Ah Long before he was locked up, it proves that he had laid aside the notion of killing him for the time being.

Moreover, there was, in the situation of Ah Long at the moment he was shot, much to disarm the passion of a reasonable man. He was a captive in the custody of the officers of the law, disarmed, helpless, and at the very door of the jail.

It was upon such testimony as this that the jury had to decide. We have not said, and we are not called upon to say, whether their verdict was the proper one or not. We are quite willing to say, however, that if it had been murder of the first degree, instead of murder of the second degree, it would have been well warranted by the testimony of the defendant himself. The verdict that was found, we think, may be accounted for without reference to hatred of Chinamen, fear of newspaper censure, or any supposed errors in the instructions. If the jury, giving the prisoner the benefit of every reasonable doubt, thought that he killed the deceased under the influence of uncontrollable passion, and without any mixture of deliberation, and if at the same time they thought that the circumstances were not such as to justify the existence or persistence of irresistible

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passion in a reasonable man, their verdict was perfectly consistent with the law, and was based upon a very charitable view of the defendant's conduct.

Another matter to be disposed of before coming to the two instructions which were discussed in our former opinion, is the claim of counsel that, although the instructions which are said to have been given by the district court of its own motion are not in the record, and cannot, therefore, be made the basis of our decision, they ought, nevertheless, to be considered to a certain extent, and allowed some undefined weight in shaping our conclusions.

We think it ought not to be necessary to say that it is the duty of this court to decide the questions of law that are properly presented for its decision, without allowing itself to be prejudiced or influenced by matters of which it cannot take judicial cognizance. If these supposed instructions are not in the record, we do not know that they were ever given. If, notwithstanding our duty to ignore them, we should choose to believe that they were given in the case, and if we should also consider them as flagrantly erroneous and as prejudicial to the defendant, as in the opinion of his counsel they were, we might not be able to consider the questions presented by the record as impartially as we ought, but just so far as we allowed ourselves to be influenced by such extraneous matters we should be derelict. What is in the record it is our duty to allow its full weight; what is not in the record cannot be used as a make-weight to eke out an argument that would be incomplete without it.

We come now to instructions numbers one and two, upon the construction of which our decision must turn. It is constantly assumed in the petition for a rehearing that, in our former opinion, we conceded those instructions to be clearly erroneous; that, taken by themselves, they misstated the law of this case. A careful reading of that opinion will convince counsel of their mistake. We never decided, and never intended to decide, the proposition which they so vigorously combat. We never entertained the opinion that where two instructions are given covering the same point, one clearly erroneous and the other clearly correct,

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that the erroneous instruction is cured by the correct one. The proposition we endeavored to state and to enforce was this: Where two instructions are given on the same point, one clearly and unequivocally correct, the other ambiguous and susceptible of two constructions, according to one of which it is correct, but according to the other of which it is erroneous, since it is the duty of the jury to read and consider all the instructions together, they will put that construction upon the doubtful one which makes it consistent with the other, and reject that construction which brings the two in conflict. This is a principle of construction universally acknowledged, because it is obviously a reasonable principle, and because any contrary principle would be as obviously unreasonable.

Now, we did not assume in our former opinion all that we are charged with having assumed, but we do assume some things that the counsel think ought not to be assumed. It is the duty of juries to read and consider all the instructions of the court, and we presume that they do so. It is their duty to understand the instructions, and we assumed that, in the effort to find out their meaning, they resort to the same reasonable and obvious principles of construction by which courts are guided in the interpretation of a doubtful clause of a statute or a contract. Of course, if these assumptions are unfounded, our decision of this case is all wrong; but we entertain no doubt of their correctness, and we think they fully support everything that has been decided.

We did not say in our former opinion that instruction number two misstated the law applicable to this case. We said that, taken by itself, it *would bear* the construction placed upon it by counsel, and that a jury might understand it in that sense. We said in one place, speaking of both instructions, "on such hypothesis they do not misstate the law; at least not in a manner which could possibly have prejudiced the defendant." Here is an admission that in some particular they do misstate the law, and so they do. They assume to state the distinction, and the whole distinction, between murder of the first and murder

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of the second degree; but they fail to do so, for the reason that there are cases of murder in which the intent to kill need not exist, as where a killing is perpetrated in the commission or attempt to commit a felony. The same defect of these instructions is again alluded to at the close of the opinion, where it is said, speaking of number one: "It is neither a full nor a perfectly clear statement," etc. It is not a full statement of the distinction between the two degrees of murder, because there is a class of cases in which the intent to kill need not exist. Therefore, because it assumed to be what it was not, we refrained, out of abundant caution, from saying unqualifiedly that it did not misstate the law, contenting ourselves with saying that it did not misstate the law of this particular case.

We said again, at the very close of the opinion, speaking of number two: "It is susceptible of a construction according to which it would be erroneous, and but for the clear and definite instruction on the subject of voluntary manslaughter, by which it was accompanied and qualified in this case, it must have been so construed." We thought this expression was sufficiently guarded, but, perhaps, it was not. We did not mean that, if this instruction had stood alone and unqualified, the *jury must* have understood it in an erroneous sense; but merely this, that, as *they might* have so understood it, *we must* have so construed it in order to protect the defendant from a possible injury. It will be seen that this meaning is entirely consistent with the whole of the opinion, and that any other meaning is inconsistent with it. We thought it proper to express our disapproval of these instructions as models to be followed hereafter, but we stated explicitly our reasons for such disapproval. The instructions are not full, and they are not clear. Because they assume to state broadly the distinction between the two degrees of murder, and fail to do so, they are inaccurate; because, standing by themselves, they might be understood to mean that the bare intent to take life makes a homicide murder, they are not clear. These were the grounds, expressly stated, of our disapproval of them, and neither of these grounds avails

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in this case. There was no question here of a homicide committed in the perpetration or attempt to perpetrate a felony; and that sense of the instructions in which they would have been erroneous was excluded by the clear and unequivocal meaning of another instruction.

Trusting that we have made the meaning of our former opinion clear, we will now proceed to consider the objections of appellant to what we did decide. He contends that there is no language in instruction number two which implies deliberation, and nothing in the instruction asked by himself that excludes the notion that a bare intent to kill makes a killing murder.

It is agreed upon all sides that an intent to kill exists in all cases of voluntary manslaughter, but in such cases the killing is intentional only in the sense of not accidental; it is voluntary, not the result of inadvertence. In voluntary manslaughter there must be no mixture of deliberation. The passion must be such as to exclude the power of reflection. The language of the instruction is: "A design, a determination, to kill, distinctly formed in the mind." We think these words do, in their natural sense, imply deliberation. Certainly they mean a great deal more than the simple impulse to slay which characterizes manslaughter. The word "determination" in this instruction is not used in any technical sense; in fact, it has no technical sense in which it means less than it does in its popular signification. Webster defines it to be a "decision of a question in the mind; firm resolution; settled purpose." Can it be said that a question can be decided, a wavering resolution made firm, or a hesitating purpose settled without deliberation?

The chief justice, in his dissenting opinion, has brought forward Bouvier's definition of the word "intention" to prove that it means as much as "determination," and therefore that "determination to kill distinctly formed in the mind," means no more than the impulse to slay which exists in manslaughter. We think there is a fallacy in this argument. Bouvier gives to the word "intention" its broadest technical meaning—that which is common to it as used not only in reference to criminal acts, but also in speaking of

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the intention of a testator; of the parties to a contract; of the legislature. In all these cases the word implies the maturest deliberation, and it is the full equivalent of "determination." In reference to criminal acts, also, it is the exception, and not the rule, for intention to mean anything less than a deliberate purpose. Out of the long list of crimes there are but two or three in which the intention to do the forbidden act can arise from a mere impulse of passion. To prove, then, that intention usually means as much as determination, does not prove that the latter ever means less than it is defined to mean, viz: The decision of a question in the mind; a firm resolution; a settled purpose. We remain of the opinion that the language of the instruction, strictly construed, does imply deliberation.

But we have conceded that it might have been misunderstood if it had not been for the instruction given at defendant's request, and counsel argue that that instruction could not have been taken to qualify the other in any way, because it related to another matter. One was on the subject of murder, they say, and the other on the subject of manslaughter. In answer to this objection we say murder and manslaughter are degrees of the same offense. If an instruction can be framed to define the one without in some measure defining the other, this case, at all events, does not illustrate the possibility. An instruction which tells a jury that "killing upon sudden heat of passion," etc., is manslaughter, *and not murder*, may be fairly said to be on the subject of murder.

But counsel still contend that if this instruction is read in connection with the other, there is nothing in it to exclude the notion that a bare intent to kill makes the killing murder in all cases, even though it be a mere impulse of uncontrollable passion caused by an adequate provocation. It certainly does exclude any such notion unless it can be maintained that this jury, in the face of the uncontradicted testimony of all the witnesses, including the defendant, might have understood the court to mean that if the defendant *accidentally* or *inadvertently* killed the deceased while laboring under the influence of uncontrollable pas-

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sion, then only was the killing manslaughter and not murder. But to adopt this view would, it seems to us, be equivalent to denying the jury any share of common sense. When people talk of a killing being done under the influence of sudden passion, they are never understood to be talking about an accidental or involuntary killing, and if it could be supposed that any jury ever would understand such language in such a sense, this jury at least could not have done so. The instructions must have been understood as having some reference to the testimony in the case, and there was no question here of an accidental killing. The killing was admitted, and the defendant swore that he armed himself for the very purpose of doing it.

Finally, it may be said that it is certain that this jury could not have understood the instructions complained of to mean that a bare intent to kill, without premeditation or deliberation, makes an unlawful killing murder. If they had so understood, they would have been compelled to find a verdict of murder in the first degree. The theory of counsel is, that the jurors in this case were impelled, by hatred of Chinamen and fear of the newspapers, to deal severely with the defendant, and that they understood the court to instruct them, that if the defendant killed Ah Long intentionally he was guilty not of simple murder, but of murder in the first degree. The fact that the killing was intentional was rendered certain by the testimony of the defendant himself. It follows that the duty and the inclination of the jurors concurred in demanding a verdict of murder in the first degree. But they found murder in the second degree. What sort of a theory is it which supposes that jurors will violate their sworn duty in order to go counter to their wishes and their fears?

The judgment is affirmed.

HAWLEY, C. J., dissenting:

I adhere to the views expressed in my dissenting opinion, and, for the reasons therein stated, I think the judgment ought to be reversed.

Argument for Appellant.

[No. 842.]

ALVARO EVANS, RESPONDENT, v. L. W. LEE, APPELLANT.

STATUTE OF FRAUDS—PAROL AGREEMENT—PART PERFORMANCE.—The statute of frauds is intended for the protection of the respective parties to a parol agreement. Whenever one party, confiding in the integrity and good faith of another, proceeds so far in the execution of a parol contract that he can have no adequate remedy unless the whole contract is specifically enforced, then equity requires such relief to be granted.

IDEM.—Nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed.

IDEM.—To entitle a party to take the case out of the statute of frauds, upon the ground of part performance of a parol contract, it is essential that the terms of the contract should be clearly and definitely established.

IDEM.—Before the contract can be enforced it must be shown that the party seeking its enforcement has performed, or offered to perform, or been ready and willing to perform, all the essentials of the agreement on his part.

IDEM—EJECTMENT.—If a party is in possession of land under a parol contract that is not valid either in law or equity, or if a party, after being admitted into possession under a valid contract to purchase, refuses to comply with his agreement, he is a mere trespasser, and liable to be removed by ejectment, at the will of the owner of the legal title.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are sufficiently stated in the opinion of the court.

Robert M. Clarke, for Appellant:

From the facts, as found by the court, it is clear that as to lot one there is a ratification of the parol contract of sale, and as the possession and valuable permanent improvements take the case out of the statute of frauds, the defendant should recover lot one.

As to lot two, the findings are equally specific. If as to lot two there was a taking of possession and making of valuable improvements in pursuance of the parol contract, then such possession and improvements take the case out of the operation of the statute of frauds, and the case stands as though the contract had been in writing, and the defendant must prevail.

If a man has been permitted to take possession on the faith of an agreement, it is against equity that he should be

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treated as a trespasser and turned out of possession, on the ground that there is no agreement. (Kerr on Fraud and Mistake, 135; Browne on Statute of Frauds, sec. 467; 4 Kent's Com. 451; 1 Sugden on Vendors, 226; 1 Story Eq. Jur. sec. 761; Willard's Eq. Jur. 285; *Eaton v. Whittaker*, 18 Conn. 222; *Tilton v. Tilton*, 9 N. H. 386; *Pugh v. Goods*, 3 Watts and Serg. 56; *Johnston v. Glancy*, 4 Blackf. 94; *Butcher v. Stapley*, 1 Vern. 364; *Boardman v. Mostyn*, 6 Ves. 467; *Anderson v. Simpson*, 21 Iowa, 399; *Green v. Richards*, 23 N. J. Eq. 32; *Horn v. Ludington*, 32 Wis. 73. *Wood v. Thornly*, 58 Ills. 464; *Edwards v. Fry*, 9 Kan. 417; *Kelley v. Stanbery*, 13 Ohio, 408.)

Thomas E. Haydon, for Respondent.

By the Court, HAWLEY, C. J.:

This is an action of ejectment brought to recover the possession of two small tracts of land, designated as lots numbers one and two (containing eighteen acres, more or less), being a portion of the land which plaintiff purchased on the twelfth day of November, A.D. 1873, by sale made under a mortgage executed by the Nevada Land and Mining Company, limited, on the twenty-ninth day of March, A.D. 1870, and recorded on the fourteenth day of July, A.D. 1870. Lot one contains about four acres.

The defendant claims the land in dispute under an alleged parol contract from said corporation to convey the premises to him. It appears, from the findings of the court below, that defendant, Lee, with full knowledge of the existence of the mortgage above-mentioned, on the eighteenth day of August, A.D. 1872, made a verbal agreement with one F. F. Osbiston, acting for said corporation, by the terms of which the defendant, Lee, was to pay, and did pay, the sum of one hundred dollars to said company, and took possession of lot one, "and upon payment by defendant of a further sum reserved to be paid afterwards, said company agreed to convey to defendant the title to said land; that defendant continued in possession of said land from said eighteenth day of August, 1872, until its purchase by plaintiff, and ever

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since then until the present; that after the entry of defendant under said agreement upon said land he made permanent and valuable improvements thereon, as stated in his answer, to-wit: of the value of five hundred dollars, and more, prior to the purchase by plaintiff of said land; that such improvements are permanent in their character, and are a sufficient compensation to plaintiff for any damage that accrued prior to the commencement of this suit, by reason of defendant withholding said land to commencement of this suit; that defendant informed William A. Storry, the attorney in fact for the grantors of plaintiff, of his verbal agreement with the Nevada Land and Mining Company for the purchase of lot one in Dunne's north addition and the north extension of Virginia street, adjoining said lot one, and of his part performance of said contract, and that defendant and said Storry then agreed verbally that said mortgagees would execute a deed and sell to defendant lots one and two for the consideration of five hundred and twenty-five dollars, to be paid in hand by defendant to the grantors of said plaintiff on the execution of said deed; that defendant, Lee, paid no part of said sum, took no possession of said land under said agreement, and made no improvements thereon under and by virtue of said agreement with said Storry; that on the day of the purchase by plaintiff from his grantors, through said Storry, their attorney in fact, plaintiff saw defendant, and he told plaintiff of said verbal agreement with said Nevada Land and Mining Company of his possession and improvements thereunder of lot one and said north extension of Virginia street, and that plaintiff then, verbally, promised defendant, in case he purchased the land in controversy, he would make it all right with defendant as to his purchase of said land from the Nevada Land and Mining Company, but that defendant never paid any sum, whatever, to plaintiff, took no possession of said land under such assurance, and made no improvements on said land under plaintiff's assurance that he would make it all right with defendant as to said land, but defendant was simply left by said Storry and plaintiff in *statu quo* in regard to said land, as they respectively find him."

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Upon these findings of facts, the court rendered judgment in favor of plaintiff for the recovery of the land in controversy in this suit. From this judgment, and from the order of the court denying defendant's motion for a new trial, the defendant appeals.

The plaintiff, by his purchase under the mortgage, became vested with whatever title the Nevada Land and Mining Company, limited, had on the day of the execution and recording of said mortgage, which was long prior to the verbal agreements made with Osbiston and with Storry.

Unless said agreements were of such a character as to bind plaintiff, or unless plaintiff is bound by some verbal assurance made on his part at the time of his purchase, it is evident that defendant has no right to the possession of the land in controversy.

It is not pretended that plaintiff would be bound by the verbal agreements made by Storry or Osbiston, unless he had knowledge of their existence, and it does not appear from the findings of the court that he had any knowledge of the alleged contract of defendant with Storry for the purchase of lot two, or that he ever gave to defendant any assurance whatever that he would convey lot two to defendant, or make it all right with him in regard to that portion of the land. It is true that Lee testified that he showed plaintiff the boundaries of lot number two, and pointed out the identical ground in controversy in this suit, and that plaintiff promised that if he bought the land he would do the same by him as the English company had agreed to do; but the plaintiff, in his testimony, states positively that at the time he had the conversation in regard to the property, the defendant said: "He had no claims on anything except that four-acre piece." In his testimony the plaintiff says: "At the time I made the purchase I did not understand Lee to claim anything except that block of four acres, or about that." In another portion of his testimony he says: "I didn't know he claimed anything but that four-acre lot, until he went to fencing it." Upon cross-examination, he said that just prior to the purchase, Storry told him that Lee had a claim on the four-acre lot; that Lee "had no

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rights whatever, although he had a claim from Dunne on the land he had purchased," and adds: "I recollect asking Lee myself what title he had to the land, and he showed me a filing on a portion of section two of state land, * * * and also a receipt from Dunne or Osbiston for one hundred dollars that he had paid on block one." When plaintiff was called upon to testify in rebuttal as to what was said at the time of his purchase of the land, the court asked him this question: "Did Lee, on that occasion, claim to be the purchaser of any other land than lot number one?" His answer was: "He claimed they had promised to sell it to him, but he had abandoned it. He did not claim to have any title to it before he went and filed on it as state land. He said that he had abandoned all his title from the agents."

There is other testimony in the record equally clear and positive on this point; but enough has been quoted to show that the court was justified in only finding that there was a verbal assurance upon the part of plaintiff as to lot one. This being true, it necessarily follows that as to lot two the defendant is a mere trespasser, and liable to be removed from the possession, in an action of ejectment, by the owner of the land. (Brown on Statute of Frauds, sec. 483.)

As to lot one, the plaintiff did promise, as stated in the findings, that in case he purchased the land, he would make it all right with defendant; that is, he verbally promised to do what the Nevada Land and Mining Company, through its agent, had agreed to do. From an examination of the evidence, as well as from the findings of the court, it is manifest that the defendant failed to establish any valid title to lot one.

The agreement of Osbiston was subject to the mortgage under which the plaintiff derived title. It was uncertain and indefinite as to its terms, and was not, in our judgment, such an agreement as could be enforced. But, if all the objections against the agreement made by Osbiston are waived, it is still very evident that the defendant is not entitled to recover the land upon the verbal assurance made by plaintiff. It is not shown, or attempted to be shown, that defendant entered into the possession of the land

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designated as lot one, or that he made any improvements thereon, or in any manner expended any money on the faith of the verbal assurance made by plaintiff. Moreover, the defendant does not allege, in his answer, that he has performed, or offered to perform, his part of the agreement, or that he is ready or willing to perform it; but he seeks to hold the land without paying the further sum of three hundred dollars, which he admits was to be paid before he was entitled to a deed. The testimony fails to establish the performance, or part performance, of the agreement upon the part of defendant in any particular whatever. It is true that Lee told the plaintiff once "that he owed three hundred dollars on the land, and that he was ready to pay it to whomsoever it belonged." But he never tendered the money. The testimony upon the part of defendant, as well as on the part of plaintiff, sustains the findings of the court, relative to lot one, that defendant never paid any sum whatever to plaintiff, took no possession of said land, and made no improvements, under plaintiff's verbal assurance to make it all right.

This finding is conclusive upon the point that there has been no such performance, or part performance, on the part of defendant as to constitute any valid defense to this action. We think the authorities cited by appellant fully sustain the conclusions we have reached. In fact, there does not appear to be any conflict in the authorities as to the legal principles applicable to this case.

The statute of frauds is intended for the protection of the respective parties to a parol agreement. Whenever one party, confiding in the integrity and good faith of another, proceeds so far in the execution of a parol contract that he can have no adequate remedy unless the whole contract is specifically enforced, then equity requires such relief to be granted; because, if the rules were otherwise the statute, which is designed to prevent fraud, would itself become an instrument of fraud; and hence it is that courts of equity in cases where a party has entered upon land and made permanent and valuable improvements thereon, under and in pursuance of a parol agreement for its purchase, will enforce

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the contract. But in all such cases it must clearly appear that the improvements were made with a view to the performance of the contract, and the governing rule invariably is “that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed.” (1 Story Eq. Jur. sec. 761.)

To entitle a party to take the case out of the statute of frauds, upon the ground of part performance of a parol contract, it is essential that the terms of the contract should be clearly and definitely established. (1 Story on Eq. Jur. sec. 764; *Petrick v. Ashcroft*, 4 C. E. Green, 339; *Foster v. Kimmons*, 54 Mo. 488; *Allen v. Webb et al.* 64 Ill. 342.) The acts of the party must, as stated by Story, “clearly appear to be done solely with a view to the agreement being performed.” (Story Eq. Jur. sec. 762.)

It is also well settled that before the contract can be enforced, it must be shown that the party seeking its enforcement has performed, or offered to perform, or been ready and willing to perform, all the essentials of the agreement on his part. (Fry on specific performance of Contracts, sec. 608; *Longworth v. Taylor*, 1 McLean, 395; *Colson v. Thompson*, 2 Wheat. 336; *Bates v. Wheeler*, 1 Scam. 54; *Goodale v. West*, 5 Cal. 341; *Brown v. Haines*, 12 Ohio 1; *Earl v. Halsey*, 14 N. J. Eq. 332; *Thorp v. Petit*, 16 N. J. Eq. 488.)

If a party is in possession of land under a parol contract that is not valid either in law or equity, or if a party, after being admitted into possession under a valid contract to purchase, refuses to comply with his agreement, he is a mere trespasser, and liable to be removed by ejectment, at the will of the owner of the legal title. (Story Eq. Jur. sec. 761; Willard's Eq. Jur. 285.)

The other questions argued by appellant were settled by the former decision in this case, (*Evans v. Lee*, 11 Nev. 194) and will not be again discussed.

The judgment of the district court is affirmed.



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
OCTOBER TERM, 1877.

[No. 864.]

THE STATE OF NEVADA, RESPONDENT, *v.* GEORGE
RYAN, GEORGE FISHER AND GEORGE BEN-
NETT, APPELLANTS.

BURGLARY—INSUFFICIENCY OF EVIDENCE.—Testimony that defendants broke into a tool-house of the railroad company, took therefrom a hand-car, placed it on the track, propelled themselves a distance of twelve miles, removed the hand-car from the rails to the side of the track, and there left it: *Held*, insufficient to show that the breaking into the tool-house was with the intent to commit larceny.

IDEM--INTENT NECESSARY TO CONSTITUTE LARCENY.—There may be a larceny without any intent on the part of the thief to profit himself, but there cannot be a larceny without an intent to deprive the owner of his property.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The facts are stated in the opinion.

A. W. Fiske and G. G. Berry, for Appellants.

I. To constitute larceny there must be a felonious taking of the property of another, with the intent to deprive the

Opinion of the Court—Beatty, J.

owner of his interest or property therein, and that the person taking such property should expect to reap some advantage to himself. The property must be taken *lucri causa*. (Wharton Cr. Law, vol. 2, sec. 1781.)

II. In the United States, the qualification *lucri causa* has been accepted by the courts as an unquestioned part of the common law. (Wharton Cr. Law, vol. 2, sec. 1784.)

III. To constitute burglary, the entry must have been with felonious intent, or with intent to steal, and that intent will not be inferred from the bare fact of entry, but must be proven. (Bish. Cr. Law, vol. 1, sec. 342; Russell on Crimes, vol. 1, 821, 823, 827.)

John R. Kittrell, Attorney-General, for Respondent.

By the Court, BEATTY, J.:

The defendants in this action were convicted of burglary. They moved for a new trial on the ground that the verdict was contrary to the evidence; and they now appeal from the judgment and the order overruling their motion for a new trial.

The charge in the indictment is that the defendants broke into a tool-house of the Central Pacific Railroad with intent to commit larceny. The bill of exceptions contains all the testimony which in anywise tended to establish the guilt of the defendants, and it amounts simply to this: The three defendants and one other person (who gave evidence for the state) were traveling along the line of the railroad from California toward the eastern states. They broke into a tool-house of the railroad company one night, took therefrom a hand-car, placed it on the track, propelled themselves a distance of twelve miles, removed the hand-car from the rails to the side of the track, and there left it. This is the whole case. There was not a particle of proof, and there can be no presumption, that the defendants broke into the tool-house with any other intent or purpose than that of taking the hand-car and using it as they did use it. If such taking and use was not larceny, there was no proof that the breaking into the tool-house was with the intent to commit

Points decided.

larceny, and that essential element of the crime of which they were found guilty was not proved.

We have no doubt that the taking and use of the hand-car was not larceny. The attorney-general does not contend that it was, and the only case to which we have been referred as sustaining the ruling of the district court is that of *The People v. Juarez* (28 Cal. 380). But that case does not sustain the action of the district court. It merely follows the case of *Rex v. Cabbage*, which established the principle that where there is an intent to deprive the owner of his property, it is not essential that the taking should be with a view to pecuniary profit (*lucri causa*). We acknowledge the correctness of this principle. A man may be guilty of larceny if he takes another man's whisky, intending to drink it, though it is certain he will not be a gainer, pecuniarily or otherwise, by the transaction. But, although there may be larceny without any intent on the part of the thief to profit himself, we do not know of a case where it has been held that there can be larceny without any intent to deprive the owner of his property. And that is the case here. There is not the slightest ground for supposing that these defendants intended to deprive the railroad company of its property in this hand-car. They committed a trespass, but they are not guilty of burglary.

The judgment and order of the district court are reversed and the cause remanded.

Remittitur forthwith.

[No. 863.]

THE STATE OF NEVADA, RESPONDENT, v. SAM.
MILLS, APPELLANT.

EVIDENCE IN CRIMINAL CASE, WHEN PART OF THE RECORD ON APPEAL.—The only method of making the evidence in a criminal case a part of the record on appeal is to embody it in a bill of exceptions.

IDEM—BILL OF EXCEPTIONS.—The bill of exceptions, properly settled and signed by the judge, together with the rest of the record as provided for in section 450 of the criminal practice act, is all that the supreme court will notice in the examination of a criminal case on appeal.

Opinion of the Court—Leonard, J.

IDEM—JURISDICTION LIMITED TO QUESTIONS OF LAW.—The jurisdiction of the supreme court in a criminal case is limited to questions of law alone. No judgment of conviction will ever be reversed upon the ground that the verdict is contrary to the evidence, if there is any evidence to support it.

APPEAL from the District Court of the Ninth Judicial District, Elko County

The facts are stated in the opinion.

Stafford & Kingston, for Appellant.

To constitute murder in the first degree, the intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. (*People v. Nichols*, 34 Cal. 212; *State v. Raymond*, 11 Nev. 98.)

The testimony of the witnesses shows conclusively that the appellant acted upon the sudden heat of passion, aroused by extreme intoxication and the assault and battery committed upon his person by one Webb, immediately preceding the shooting of Finnerty. There was no willful, deliberate premeditation to injure any one, nor any hostile demonstration whatever exhibited against the deceased or any one prior to the assault of Webb upon him.

John R. Kittrell, Attorney-General, for Respondent.

By the Court, LEONARD, J.:

Appellant was convicted of the crime of murder of the first degree. He appeals from the judgment and the order overruling his motion for a new trial. The grounds of the motion were that the verdict was contrary to law and the evidence. We are urged to reverse the order and judgment on the sole ground that the evidence did not justify a verdict of murder of the first degree. The bill of exceptions proper presents no part of the evidence, and only contains the fact that after trial, appellant, by his counsel, filed his motion for a new trial, which was submitted without argument; that the court overruled the motion, and appellant

Opinion of the Court—Leonard, J.

excepted. There is, however, in another part of the transcript, what is denominated "statement of the evidence on appeal," which is certified by the judge as being "true and correct, and containing all the testimony in the case." Counsel for the respective parties also agree that it is "correct." The attorney-general insists that this statement of evidence cannot be considered by this court, for the reason that it is not embodied in the bill of exceptions, and is not any portion of the record. The statute is plain as to the method of procedure in the appeal of criminal cases, and this court has in several instances taken occasion to comment in plain terms upon the inexcusable inattention often manifested in making up transcripts. (*State v. Huff*, 11 Nev. 22; *State v. Larkin*, Id. 314; *State v. Ah Mook*, decided at last term.)

The statute does not make the evidence given in any criminal case a part of the record, and the only method of making it a part of the record is to embody it in a bill of exceptions. (Crim. Prac. Act, secs. 424 and 450.) So much of the evidence only as is necessary to present the question of law upon which the exceptions were taken should be embodied in the bill of exceptions, and any other evidence should be stricken out by the judge, whether agreed to by the parties or not. The bill containing the exceptions, and so much of the evidence as may be necessary, properly settled and signed by the judge, together with the rest of the record as provided by section 450, is all that this court can notice in the examination of a criminal case on appeal.

But should we consider the evidence contained in this transcript the same as if it had been embodied in the bill of exceptions, we should be unable to reverse the order and judgment of the court below, for these reasons:

This court cannot reverse a judgment in a criminal case on the ground that the verdict is contrary to the evidence, where there is any evidence to support it. When there is some evidence to support every fact necessary to make the crime complete, a *prima facie* case is made out; and when that conclusion is reached, we have no jurisdiction to look

Opinion of the Court—Leonard, J.

beyond and decide as to the weight or preponderance of evidence. (*State v. Huff*, 11 Nev. 26.) It is the duty of the jury to resolve every reasonable doubt in favor of the defendant. They hear the words and observe the manner of the witnesses. Their situation enables them to ascertain with considerable accuracy whether a witness is speaking the truth or uttering a falsehood. Hence, the law has made them the judges of facts, and given them the liberty of believing or disbelieving all or any portion of the testimony of any witness. But, lest the jury should arrive at an erroneous conclusion upon questions of fact, or the court upon questions of law, an additional guard has been thrown around the defendant in the trial court. If either or both of these errors have occurred at the trial below, that court, having witnessed all the proceedings, and being cognizant of the merits of the case, is permitted to pass upon and correct them.

But, by a wise constitutional provision, the jurisdiction of this court, because of its situation, has been limited, in criminal cases, to questions of law alone. We can, as a question of law, decide whether or not there is any evidence in the record to support every fact that is necessary to constitute the crime of which the defendant has been convicted; but should we pass beyond that limit, we should assume the duties of the trial jury and court below, disregard a constitutional prohibition, and often fall into the error of giving weight and value to false testimony that has been properly considered and rejected by those who alone can judge of its character.

There is very little conflicting testimony in this case. It is undisputed that the appellant, at Halleck station, in Elko county, in this state, on the seventh day of June last, ran from Griffin's saloon to a house belonging to one Hughes, got a shotgun, came back to the saloon, and there stood a short time, four or six feet from and nearly in front of the closed door; when the door was partially opened by deceased, defendant raised his gun and fired, instantly killing the deceased, James Finnerty; that appellant then immediately mounted a horse standing near the house and rode away, carrying the shotgun with him.

Opinion of the Court—Leonard, J.

There is also uncontradicted testimony, that prior to the homicide, appellant had been drinking, and one witness testified that he was drunk; but no facts are stated showing the extent of inebriety.

It also appears that appellant and one Webb, a few minutes before the shooting, had a quarrel; that Webb struck appellant several times; that deceased and one Griffin separated them, when all but appellant went into the saloon and remained until the homicide; that appellant, instead of going into the saloon, soon started for Hughes's house and returned with the shotgun. There is testimony that he appeared excited, and, also, that he did not. Mr. Hatch testified that he hailed him when going with the gun to the saloon, and advised him to stop, when appellant replied that "he (witness) had better attend to his own business, or he would get a dose." Witness did not think appellant was much excited. Mr. Griffin testified, that on the same day, a short time before the quarrel between Webb and appellant, he heard the latter say, "he would kill some ——, and he did not care who it was." It does not appear that either of the parties was armed except appellant.

Every instruction asked by counsel for appellant was given to the jury, who were fully advised by the court as to what constituted the difference between murder of the first and second degree and manslaughter, and also the effect of drunkenness. The homicide was committed about one o'clock P. M., and the upper portion of the door was glass. Appellant and deceased had had no particular difficulty. Upon this evidence, should we consider it, we could not say, as a question of law, that the testimony was insufficient to justify a conviction of murder of the first degree.

The judgment and order appealed from are affirmed, and the district court is directed to fix a day for carrying its sentence into execution.

Opinion of the Court—Hawley, C. J.

[No. 873.]

THE STATE OF NEVADA, EX REL. F. V. DRAKE,
RELATOR, *v.* W. W. HOBART, RESPONDENT.

OFFICE OF STATE CONTROLLER.—The office of state controller is one of public trust, and is conferred upon the individual for the benefit of the public.

IDEM—WHEN MANDAMUS SHOULD ISSUE.—If the acts which the state controller refused to perform concern the public interests and are such as the law requires to be performed by him, the writ of mandamus should issue to compel the performance of such duty.

STATE INTERESTED IN COLLECTION OF TAXES.—The state is interested in having the delinquent taxes due the respective counties collected, whether any portion thereof belongs to the state or not.

IDEM—DUTY OF DISTRICT ATTORNEY.—The duty of bringing suits for the collection of delinquent taxes is specially imposed upon the district attorney.

IDEM—DUTY OF STATE CONTROLLER.—It is the duty of the state controller to allow the district attorney to inspect and make copies of, or abstracts, or computations therefrom, of all books, papers, statements and accounts, on file or of record in his office relating to the proceeds of mines.

APPLICATION to the supreme court for a writ of mandamus.
The facts are stated in the opinion.

Robert M. Clarke and F. V. Drake, for Relator.

C. H. Belknap, for Respondent.

By the Court, HAWLEY, C. J.:

The statute provides that the writ of mandamus may be issued “to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.” (1 Comp. L. 1508.)

The writ “shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.” (1 Comp. L. 1509.)

The affidavit presented by relator avers: “That W. W. Hobart is the duly elected, qualified and acting state controller of the state of Nevada; that the said W. W. Hobart, state controller, has, in his official capacity and keeping, duplicate or authenticated copies of the quarterly tax-lists or assessment-rolls of the proceeds of mines in Storey

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county, * * * for the following years, viz.: A. D. 1866, A. D. 1867, A. D. 1868, A. D. 1869, A. D. 1870, A. D. 1871, A. D. 1872, A. D. 1873, A. D. 1874, and A. D. 1875; that affiant is informed and believes, and therefore alleges the fact to be, that the original quarterly tax-lists, or assessment-rolls, of the proceeds of mines, as above named, were entirely destroyed by fire in said Storey county, on or about the twenty-fifth day of October, A. D. 1875; that the said duplicates, or authenticated copies, of said tax-lists, or assessment-rolls, in the office of the said state controller are a part of the public records of the state of Nevada; that affiant is informed and believes, and therefore alleges the fact to be, that divers and many corporations, owners of and working the mines in said Storey county, are indebted to and are now owing the state of Nevada, and county of Storey, large sums of money as taxes on the proceeds of said mines during and for the several years last above mentioned; that affiant is the duly elected, qualified and acting district attorney of said Storey county, * * * and as such officer it is his duty to demand, sue for and collect said sums of money from said corporations, and that it is his intention and desire so to do; that affiant is unable to ascertain the necessary facts and data upon which to institute suits to recover said sums of money, * * * from any other source than from the said duplicate or authenticated copies; * * * that affiant * * * on the fifteenth day of October, A. D. 1877, demanded inspection of the said duplicate tax-lists or assessment-rolls; that said demand was made of the said W. W. Hobart, state controller, at his office, during the business hours thereof, for the purpose of procuring the facts and data, as hereinafter indicated, which said purpose was then and there known to, and explained to, said W. W. Hobart; that the said W. W. Hobart then and there unjustly refused to allow affiant, or any person in his behalf, to inspect the same, or take copies thereof, or to furnish copies thereof, or make computations therefrom, and further declared his intention to continue to so refuse to allow inspection, or permit copies thereof to be made; * * * that for the proper preparation and

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prosecution of suits to recover the moneys due as hereinbefore set forth, it is necessary for him to be furnished with properly certified copies of every and all the said duplicate quarterly tax-lists, or assessment-rolls, for the several years hereinbefore specified."

Respondent, in his answer, denies "that divers or many corporations, or any corporations, owning or working mines in Storey county are indebted to or owing the state of Nevada large or any sums of money as taxes on the proceeds of mines during or for the years" mentioned in relator's affidavit, "or for either of said years, or any part thereof;" denies that for the proper, or any, preparation or prosecution of suits to recover moneys due, as in the affidavit of relator set forth, it is necessary for relator to be furnished with properly, or otherwise, certified copies of every, or all, or any of the duplicate quarterly tax-lists, or assessment-rolls, for the several or any of the years, or any part of the years, in relator's affidavit hereinbefore referred to; denies that he hath refused to allow relator, or any person in his behalf, to inspect said duplicate quarterly tax-lists, or assessment-rolls, or any of them." Respondent further alleges "that the making of certified copies of the duplicate quarterly tax-lists, or assessment-rolls, is not a duty resulting from the office of controller of the state of Nevada, nor a duty specially enjoined upon him as such officer."

The relator demurs to this answer upon the ground that it is insufficient in law to constitute any defense. Our attention has not been called to any provision of the law which enjoins upon the controller the duty of making certified copies of the books, statements, papers or accounts, referred to in the relator's affidavit, where no part of the taxes sought to be collected are due to the state. This is optional with the controller, and is independent of the real question at issue in this proceeding.

The office of state controller is an office of public trust, its emoluments belong to the individual officer; but the office is conferred upon the individual for the benefit of the public. If the acts which the respondent refused to perform are in their nature of such a character as concerns the

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public interests, and are acts which the law requires to be performed by the state controller, it is the duty of this court, under the provisions of the statute, to issue its mandate to compel the performance of such duties.

Upon the first point there certainly ought not to be any controversy. The respective county governments are a part of the state government, and belong to the same political society, and the state is interested in having the delinquent taxes due the respective counties collected, whether any portion thereof belongs to the state or not. It is equally clear that the district attorney is a proper party to institute these proceedings. The collection of delinquent taxes due the county and state by suit, is a duty specially imposed upon the district attorney.

Does the law enjoin upon the state controller the duty of allowing the inspection demanded by the district attorney? We are of opinion that it does. The statute, in defining the duties of the state controller, provides that "all the books, papers, files, letters, and transactions pertaining to the office of controller shall be open to the inspection of the governor; to the inspection of committees and members of the legislature, or either branch thereof, of that of any other person authorized by law." (2 Comp. L. 2822.)

It was stated in the oral argument of respondent's counsel, that the sole object of the controller in resisting the demands of the relator, was to procure from this court an interpretation of this section of the statute, in order that he might be fully advised in regard to his duties.

From the view we entertain of this case it is not necessary to particularly inquire as to the intention of the legislature in passing this law. It will be admitted that the statute, prior to the adoption of this section, did not in express terms require the state controller to exhibit his books and accounts to the inspection of the governor or members of the legislature, and that this section was inserted in order to secure that particular right. But it is evident that it was not the intention of the legislature to confine the right of inspection solely to the governor and members of the legislature. It will be observed that the

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legislature, recognizing the fact that other persons were authorized to make an inspection, in express terms declared it to be the duty of the controller to allow such inspection to be made by “any other person authorized by law.” This provision of the statute, however, is general, and relates to the entire records in the controller’s office. The question raised by the averments in relator’s affidavit applies only to the right of the district attorney to examine such books, statements, papers, and accounts as relate to the delinquent taxes on the proceeds of mines, and it is therefore proper to limit our inquiry to this particular branch of his duties.

We find in the revenue law a provision as follows: “The books, papers and accounts of each officer in regard to the assessment or collection of taxes, or to the receiving, auditing or disbursing moneys of the state, or of any county, shall, at all times during office hours, when not necessarily in use by the officers, be open to any person whomsoever to inspect or copy, without any fee or charge.” (2 Comp. L. 3202.)

If this section applies to the office of state controller, all argument is at an end in relation to his duties in reference to the real question presented in this proceeding.

In determining its applicability it must be remembered that the state controller is the auditing officer of the state. It is his duty to keep and state all accounts between the state and all persons or corporations or officers indebted to the state, or intrusted with the collection, disbursement or management of any money belonging to the state, of every kind, character and description whatsoever, and to “examine and settle the accounts of all county treasurers, and other collectors and receivers of all state revenues, taxes, tolls and incomes levied or collected by any act of the legislature and payable into the state treasury, and certify the amount or balance to the state treasurer,” and to “keep fair, clear, distinct and separate accounts of all the revenues * * of the state, and also all the expenditures, disbursements and investments thereof” (2 Comp. L. 2811); to draw all warrants upon the treasury for money (2 Comp. L. 2812, 2813), and in certain cases “to direct the attorney-general

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to institute suit for the recovery of the amount due" the state. (2 Comp. L. 2816.) In the act defining the duties of state controller, after specifying many of his duties, it is provided that he "shall perform all such other duties, not enumerated in this act, as may be required by law." (2 Comp. L. 2821.)

In the revenue act it is made the duty of the county auditors to transmit to the state controller a statement, in such form as the controller of state may require, of all and each particular kind of property delinquent, and the total amount of delinquent taxes (2 Comp. L. 3146), and the amounts stricken off the delinquent lists by the board of county commissioners. (2 Comp. L. 3164.)

In the act relating to the proceeds of mines it is made the duty of the county auditor to prepare a statement of the total number of tons of ore, quartz or mineral, bearing gold and silver, listed upon the assessment roll, the total value thereof and the total amount of taxes on the same. This statement must be forwarded to the controller of state. (Vol. 2, Comp. L. 3219.) It is also made the duty of the county auditor to transmit to the controller a statement, in such form as the controller may direct, of the total amount of delinquent taxes on the proceeds of mines. (2 Comp. L. 3225.)

From the various provisions of the act defining the duties of the state controller, the revenue acts and acts relating to the proceeds of mines, we are of opinion that respondent is one of the officers to whom section 3202 applies, and that it is his duty to allow the relator to inspect any and all books, papers, statements and accounts on file or of record in his office relating to the taxes on the proceeds of mines in Storey county during the several years mentioned in relator's affidavit, and to allow the relator to make copies thereof or abstracts or computations therefrom, free of charge, at any time during office hours, when the same are not necessarily in use by the state controller.

Let the writ issue to compel the performance of this duty.

Statement of Facts.

[No. 872.]

THE STATE OF NEVADA, RESPONDENT, *v.* CHARLES HARRIS, APPELLANT.

INDICTMENT—FORM OF, IN CHARGING MURDER.—An indictment which specifically accuses the defendant “of the crime of murder” instead of using the general words “of a felony” is unobjectionable.

IDEM—“CONTRARY TO THE FORM OF THE STATUTE.”—The words “contrary to the form of the statute,” etc., are not essential in an indictment for murder, which is a common law offense.

OBJECTIONS TO AN INDICTMENT—WHEN NO GROUND OF DEMURRER.—An objection that an indictment has not been found, indorsed or presented as prescribed by law, is not a ground of demurrer, but must be taken by motion to set aside the indictment before pleading to it.

IDEM.—An objection that the indictment was not signed by the district attorney cannot be made by demurrer, but must be made by motion to set aside the indictment.

DISTRICT ATTORNEY AUTHORIZED TO APPOINT DEPUTY.—The district attorneys of the several counties in this state have authority to appoint deputies.

SEPARATION OF JURY.—The fact that one of the jurors was where he could exchange a single word with a stranger without being overheard by the officer in charge is sufficient to establish a technical separation of the jury.

IDEM—DUTY OF OFFICER.—An officer in charge of a jury in a criminal case ought not to permit strangers to have access to a juror out of his sight and hearing, and thus afford an opportunity, however slight, for tampering with, or prejudicing, the juror.

IDEM—WHEN NEW TRIAL WILL NOT BE GRANTED.—Where it is shown to the satisfaction of the court that there was no misconduct on the part of the juror, the mere separation of the jury is not a sufficient ground for a new trial.

INSTRUCTIONS RELATING TO MURDER.—The instructions given in this case, relating to murder, criticised and held not to be erroneous in any sense that could have prejudiced the defendant.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

The defendant was convicted of murder in the second degree and sentenced to eighteen years in the state prison.

Upon the motion for a new trial the prosecution presented affidavits from the parties who had an opportunity to converse with the juror Todd, without the hearing of the officers having the jury in charge, showing that there was no conversation whatever about the case, or about the de-

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fendant. Affidavits were also presented from the officers in charge of the jury, tending to show that there had been no misconduct upon the part of the jurors.

The instruction referred to in the opinion of the court reads as follows: "In dividing murder into two degrees the legislature intended to assign to the first, as deserving of greater punishment, all murders of a cruel and aggravated character, and to the second, all other kinds of murder, which are murder at common law, and to establish a test by which the degree of every case of murder may be readily ascertained. That test may be thus stated: Is the killing willful (that is to say intentional), deliberate and premeditated? If it is, the case falls within the first, and if not, within the second degree. There are certain kinds of murder which carry with them conclusive evidence of premeditation; these the legislature has enumerated in the statute, and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder of the first degree. These cases are of two classes. First. Where the killing is perpetrated by means of poison, etc. Here the means used is held to be conclusive evidence of premeditation. The second is where the killing is done in the perpetration, or attempt to perpetrate, some one of the felonies enumerated in the statutes of the state of Nevada. Here the occasion is made conclusive evidence of premeditation. Where the case comes within either of these classes the test question, "Is the killing willful, deliberate and premeditated?" is answered by the statute itself, and the jury have no option but to find the prisoner guilty in the first degree. Hence, so far as these two cases are concerned, all difficulty as to the question of degree is removed by the statute. But there is another and much larger class of cases included in the definition of murder in the first degree, which are of equal cruelty and aggravation with those enumerated, and which, owing to the different and countless forms which murder assumes, it is impossible to describe in the statute. In this class the legislature leaves the jury to determine, from all the evidence before them, the degree of the crime, but prescribes for the government of their deliberation the

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same tests which has been used by itself in determining the degree of the other two classes, to wit: the deliberate and preconceived intent to kill. It is only in the latter class of cases that any difficulty is experienced in drawing the distinction between murder of the first and murder of the second degree, and this difficulty is more apparent than real. The unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thought of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer; and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing."

Wells & Stewart, for Appellant.

The points made by counsel are sufficiently referred to in the opinion.

John R. Kittrell, Attorney-General, for Respondent.

I. The separation of the jury did not amount to such misconduct as would authorize the court to grant a new trial. (*People v. Bonney*, 19 Cal. 445; *People v. Boggs*, 20 Cal. 432; *People v. Lee*, 17 Cal. 76; 2 Gra. & Wat. on New Trials, 317.)

II. Under the statutes of this state, the district attorneys have power to appoint deputies. (2 Comp. Laws, 3067.) But the office of district attorney is a ministerial office, and at common law the principal could appoint a deputy, and the acts of the deputy would be legal and binding. (5 Com. Dig. Officer D. 1, 3; 1 Salk. 96; 8 Bar. 463; *Hope v Sawyer*, 14 Ill. 254; *Touchard v. Crow*, 20 Cal. 150; *Muller v. Boggs*, 25 Cal. 175; *Jobson v. Fennell*, 35 Cal. 711.)

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By the Court, BEATTY, J.:

Most of the assignments of error of this case are based upon exceptions to the sufficiency of the indictment, and in order to pass them in review it will be most convenient to copy the indictment and the demurrer thereto. The indictment (omitting the heading) is as follows:

Defendant, Charles Harris, above named, is accused by the grand jury of the county of Humboldt, state of Nevada, of the crime of murder, committed as follows:

“The said Charles Harris, on the fourth day of July, A. D. 1877, or thereabouts, at the county of Humboldt, state of Nevada, without authority of law, and with malice aforethought, did shoot a person by the name of James Randall with a pistol, and by the said shooting inflicted upon the head of the said James Randall a mortal wound, from which said mortal wound the said James Randall died on the eleventh day of July, A. D. 1877, or thereabouts, in said county. So the grand jury aforesaid do say, on their oaths, that the said Charles Harris did unlawfully, and with malice aforethought, kill the said James Randall by shooting him with a pistol as aforesaid, at the place and in the manner aforesaid, contrary to the form of the statute [sic] in such case made and provided, and against the peace and dignity of the state of Nevada. G. P. Harding, district attorney of Humboldt county, State of Nevada. By S. S. Grass, deputy district attorney of said county.”

Then follow the names of the witnesses examined before the grand jury. The indorsement is as follows:

“In District Court, Fourth Judicial District of the State of Nevada. The State of Nevada v. Charles Harris. A true bill. James E. Sabine, foreman of the grand jury. Presented to the court by the foreman of the grand [sic] in the presence of the grand jury, and filed with the clerk of said court this eighteenth day of July, A. D. 1877. J. H. Job, clerk.”

To this indictment the following demurrer was interposed:

“Now comes said defendant and demurs to the indictment herein upon the grounds: First. The facts charged therein

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do not constitute a public offense; Second. It does not substantially conform to the requirements of sections 234 and 235 of the criminal practice act. In that part of the indictment which charges the shooting, the technical word assault is not used, and the offense is not substantially charged nor directly charged as in section 235, but argumentatively and inferentially alone. In the latter part of the indictment there is no direct charge of any offense, and no charge at all of any offense. The words used, to wit: 'So the grand jury aforesaid do say,' etc., is not sufficient to charge the defendant with any crime.

"Said indictment is a mongrel between a statutory and a common law indictment, and is not sufficient in form or substance for either. It nowhere alleges that the defendant did, without authority of law and with malice aforethought, kill the deceased, either in form or substance. Bonnifield & French, attorneys for defendant."

It is only necessary to compare the indictment with sections 234, 235, 243 and 244 of the criminal practice act to see that the objections specified in the demurrer are utterly baseless and trivial. They have not been relied upon in the argument of this court, and we shall not notice them further. There are some objections to the indictment, however, which have been urged upon our attention by counsel, and those we will notice more particularly.

First. It is said that the indictment does not accuse the defendant of the commission of a felony. This objection has reference to section 235 of the criminal practice act, which prescribes the form in which an indictment may be substantially drawn. According to that form an indictment may commence, (after the title) "Defendant A. B. above named, is accused * * * of a felony," or in a proper case "of the crime of murder." The meaning of that provision is that such or any similar form of accusation may be employed. It may be general, "of a felony," or specific, "of the crime of murder," at the option of the pleader. This indictment is specific, and it is objected to because it is not general. Such an objection refutes itself.

Second. It is said that the act complained of is not al-

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leged to have been “contrary to the form of the statute,” etc. This objection is based upon the misspelling of a word. Statute is spelled stute. If it was of the slightest consequence that the indictment in this case should have concluded *contra formam statuti*, it would require no stretch of liberality to read statute where stute is written. But these words are of no consequence in an indictment for murder, which is a common law offense.

Third. It is objected that the indorsement on the back of the indictment does not show that it was presented to the court by the foreman of the grand jury. This objection also rests upon what is manifestly a mere clerical mistake—presented by the foreman of the grand—omitting the word jury. The objection would have been without merit if it had been taken in time and in the proper manner. An objection that an indictment has not been found, indorsed or presented as prescribed by law must be taken by motion to set aside the indictment before pleading to it. (Sec. 275.) It is not a ground of demurrer. (Sec. 286.) Besides the only indorsement prescribed by law is that of the words, “A true bill,” to be signed by the foreman of the grand jury, and the names of the witnesses. (Secs. 226–229.) The indorsement usually made by the clerk as to the presentment, filing, etc., is not prescribed by law. It is useful and proper because it affords proof of those facts, but if accidentally omitted may be supplied at any time. In this case if the objection had been made at the proper time and the court had been of opinion that the clerk’s indorsement did not show a presentment by the foreman of the grand jury, the clerk would simply have been directed to amend his clerical mistake.

Fourth. It is objected that the indictment was never signed by the district attorney. It is signed Harding, district attorney, by Grass, deputy.

Counsel contend that the district attorney has no authority to appoint a deputy. We are of a different opinion; but if Harding had no authority to appoint Grass his deputy with full powers, there is at least no doubt that he could authorize him to draw up an indictment and sign his name

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to it; and this is all he appears to have done. It is contended that we must conclude that Grass also examined the witnesses before the grand jury. We cannot imagine upon what principle we ought so to conclude. The indictment does not allege it, and a demurrer merely admits facts alleged; it does not establish other facts. Besides, if we did know that Grass was present in the grand jury room when this charge was being examined, and if we thought he had no right to be there, we should only say that the defendant waived the objection by not moving to set aside the indictment at the proper time. (Sec. 275.) It ought to be understood that there are some objections to an indictment that are not raised by a demurrer.

Finally, as the last of several complete answers to this objection, we are satisfied that the district attorneys have authority to appoint deputies. There were originally in the territory of Nevada three district attorneys, one for each judicial district. By the act of December 19, 1862, the office of prosecuting attorney (one for each county) was created and that of district attorney abolished. (Stats. 1861, p. 295; Stats. 1862, p. 54.) Prosecuting attorneys were the same thing as district attorneys, except that their authority was limited to their respective counties instead of being extended to all the counties of a district; their duties were precisely the same that had formerly belonged to the district attorneys. Prosecuting attorneys were expressly authorized to appoint deputies with power to transact all business pertaining to the office. (Stats. 1864, p. 143.) This act has never been expressly repealed, but it is claimed that the office of prosecuting attorney has been abolished. We do not think the office has been abolished. There is no act expressly abolishing it. The legislature has provided for the election of district attorneys—one for each county—and devolved upon them the duties of prosecuting attorneys. (C. L. Vol. 2, Sec. 2935, *et seq.*) All that has been done is to change the title of the office. If the district attorneys are not the same officers who were formerly called prosecuting attorneys, then the office of prosecuting attorney, as distinct from that of district attorney, still exists, for it has

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never been abolished, except by creating the office of district attorney, and that would not abolish it if the office was a distinct one. We think district attorneys are prosecuting attorneys, with no change except in name, and we do not think a simple change of the title of the officer sufficient to repeal by implication the act empowering him to appoint a deputy.

This disposes of all the objections based upon the demurrer and relied upon in support of the motion in arrest of judgment.

The defendant also moved for a new trial upon two grounds—separation and misconduct of the jury and error in the instructions of the court.

The affidavits as to the first point show that while the jury was deliberating on its verdict, two of the jurors separated from the rest for the purpose of going to the water-closet. They were attended by one of the deputy sheriffs to the door of the court-house, within a few feet and within sight of the water-closet. During the time one of them remained inside a stranger entered the closet, and a few words of conversation, having no reference to the trial, ensued between him and the juror.

It may be that the fact that one of the jurors was where he could exchange a single word with the stranger without being overheard by the officer in charge is sufficient to establish a technical separation of the jury. We are inclined to think that it was, and we think the officer was to blame for permitting a stranger to have access to the juror out of his sight and hearing, and thus affording an opportunity, however slight, for tampering with or prejudicing him in respect to the case. This is a matter in respect to which officers cannot be too particular; for although it does not follow necessarily that a new trial must be granted whenever there has been a slight accidental separation of one juror from his fellows and from the officer in charge, under circumstances that admit of private communication between him and a stranger, still such things are highly improper and dangerous. The juror may be spoken to and improperly influenced in regard to his verdict, and, even if nothing of the

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kind happens, the state may not be able to show satisfactorily, as it would be bound to do, that in fact there has been no tampering with the juror and no misconduct upon his part. In this case the state did show to the satisfaction of the district judge, and to our complete satisfaction, that there was no tampering with, or misconduct on the part of the juror, the separation that occurred was therefore not a sufficient ground for granting a new trial. (*State v. Jones*, 7 Nev. 413; *People v. Boggs*, 20 Cal. 434; *Carnaghan v. Ward*, 8 Nev. 33.)

The instruction of the court which is complained of is a literal copy of the instruction, commencing with the words: "In dividing murder into two degrees," 34 Cal. 213, and ending with the words: "Followed by the act of killing," on page 215 of the same volume. That instruction was pronounced in that case (*People v. Nichol*) to be not even obnoxious to criticism. We think this is rather too high praise for the instruction, but we agree that it contains no substantial error. The criticism to which we think it obnoxious is this: An intent to kill is not essential to the crime of murder in either degree. An involuntary killing is murder if committed in the prosecution of a felonious intent (C. L. vol. 1, sec. 2327); and if the felony intended is arson, rape, robbery or burglary, it is murder of the first degree. The legislature has not made the occasion of the killing in such cases conclusive evidence of premeditation, as the instruction declares. On the contrary, it makes the malice which is implied from the circumstances of the killing, whether voluntary or not, to stand in the place of that express malice—the deliberate intention unlawfully to take away the life of a fellow creature—which is, in all other cases, essential to the crime of murder in the first degree. The perpetration, or attempt to perpetrate one of the enumerated felonies, does not necessarily prove an intent to kill, deliberate or otherwise—it simply dispenses with the existence of an intent to kill, and makes the killing murder of the first degree without regard to any intention to kill. The instruction, therefore, is obnoxious to criticism, though not erroneous in any sense that could have prejudiced this defendant; or, perhaps, in a sense that could ever prejudice

Points decided.

any defendant. It would be more likely in some cases, to prejudice the state to lay it down as a universal rule, that a deliberate intent to kill is absolutely essential to murder of the first degree in all cases.

The judgment of the district court is affirmed.

[No. 822.]

S. BUCKLEY, APPELLANT, v. ARMENIA BUCKLEY,
ADMINISTRATRIX OF THE ESTATE OF HENRY A. BUCK-
LEY, DECEASED, RESPONDENT.

PRIMARY OBJECT OF THE ACTION OF REPLEVIN.—The recovery of damages in a proper case is as much a primary object of the action of replevin, as is the recovery of the property in specie.

REPLEVIN TO RECOVER BAND OF SHEEP—RIGHT TO RECOVER THEIR INCREASE AND WOOL.—In an action brought to recover a band of ewe sheep or their value: *Held*, that their increase and the wool subsequently shorn from the band are proper subjects of litigation in the same action.

IDEM—INCREASE OF LAMBS.—The rights of the parties relative to the increase are precisely the same as their rights to the original band.

IDEM—WOOL SHORN FROM THE SHEEP.—As to the wool the remedy is judgment in damages for taking and withholding the sheep, or for the value of their use.

IDEM—INDEMNITY IN CASE OF RETURN.—The party recovering in the action is entitled to a judgment for the return of the band of sheep and the increase, if a return could be had, together with such damages as are necessary, if any, with the return, to indemnify him for all certain actual losses sustained on account of the unlawful taking and withholding, or for the value of the use of the sheep.

IDEM—INDEMNITY IN CASE RETURN CANNOT BE HAD.—If a return cannot be had, the party recovering is entitled to judgment for the value of such portion of the original band and increase, as the other party was bound to return or pay for, together with such damages as are necessary with the value to indemnify him for all certain actual losses sustained.

SUPPLEMENTAL PLEADINGS—WHEN SHOULD BE ALLOWED.—When the facts alleged in supplemental pleadings occurred after the original pleadings were filed, were consistent with and in aid of the original pleadings, and did not bring into the case any new cause of action or any controversy that was not in fact included in the issue originally made, supplemental pleadings should be allowed, if asked for, so as to protect the rights of the respective parties.

DAMAGES—WHEN EVIDENCE OF ADMISSIBLE.—Damages which necessarily result from a wrongful act, may be shown and recovered under the general allegation of damages; but damages which are the natural but not

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the necessary consequences of the act complained of must be particularly specified, or evidence of them will not be permitted at the trial.

MEASURE OF DAMAGES IN REPLEVIN.—The facts of this case and the proper measure of ascertaining and computing damages discussed at length in the opinion.

CROSS-EXAMINATION—WHEN ERROR.—The cross-examination of witnesses ought to be allowed a free range within the subject-matter of the evidence in chief, but if it ranges outside of that it is error.

BOOKS OF ACCOUNT, WHEN ADMISSIBLE IN EVIDENCE.—An account book kept by deceased, and shown to be principally in his handwriting, the entries being made at or about the time the transactions to which they referred occurred, and being the book by which the deceased settled with persons with whom he had business: *Held*, admissible in evidence.

IDEM.—If any particular entry in a book is inadmissible in evidence, the party opposing its introduction must make a specific objection thereto, or move to strike it out before he can complain of the action of the court in admitting the book as evidence.

CLOSE OF PLAINTIFF'S CASE—EXAMINATION OF OTHER WITNESSES.—Plaintiff having closed his case, and defendant's counsel having been ordered by the court to proceed with the examination of their witnesses, with the understanding that plaintiff should only have the privilege of calling one absent witness whenever he appeared: *Held*, that the court did not err in refusing to allow plaintiff thereafter to call and examine other witnesses generally in the case.

CONFLICT OF EVIDENCE—NEW TRIAL.—The judgment in a civil case will not be disturbed where there is a substantial conflict in the evidence, upon the ground that the verdict is against the evidence.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion.

W. Webster and Wm. L. Knox, for Appellant.

I. The court erred in admitting the supplemental answers as to the increase of the sheep and the shearing of the wool. The defendant cannot recover on a cause of action that did not exist when the action was commenced. (*Watson v. Thibon*, 17 Abb. Pr. 184; *Hill v. Hill*, 10 Ala. 527; *Vaughan v. Vaughan*, 30 Ala. 329; *Lovensohn v. Ward*, 45 Cal. 8; *Minnesota Co. v. St. Paul Co.*, 6 Wal. 746; *McCullough v. Colby*, 4 Bos. 603.) In replevin, if a delivery of the property is had, the claim is satisfied, except for damages for its detention. If a delivery cannot be had, the value at the place where the delivery should have been made stands in place of the property. (*Hisler v. Carr*, 34 Cal. 644.)

Argument for Respondent.

II. The court erred in refusing to allow plaintiff to introduce proof of the expenses attending the preservation and care of the flock of sheep, the production, care and marketing of the lambs and wool.

III. The court erred in refusing to grant a continuance.

IV. The court erred in allowing the plaintiff to cross-examine the witness Short as to the value of the sheep lost out of the drove. (1 Greenleaf on Ev. 445; *Harrison v. Rowan*, 3 Wash. 580; *Ellmaker v. Buckley*, 16 Serg. & Raw. 77; *Phil. & T. R. R. Co. v. Stimpson*, 14 Pet. 448; *Floyd v. Bovard*, 6 Watts & Serg. 75; *Landsberger v. Gorham*, 5 Cal. 452; *Jackson v. Feather River Water Co.*, 14 Cal. 18; *Aitken v. Mendenhall*, 25 Cal. 212; *People v. Miller*, 33 Cal. 99.)

V. The account book ought to have been excluded. (1 Greenleaf on Ev. 118, and cases there cited; *Cooper v. Morrel*, 4 Yeates, 341; *Wilson v. Goodin*, Wright (Ohio,) 219.)

VI. The court erred in refusing to allow the witness, George Buckley to be examined by plaintiff after defendant had commenced the examination of her witnesses. (*Jolly v. Foltz*, 34 Cal. 321.)

William Cain, for Respondent.

I. In an action for the claim and delivery of personal property, if the defendant claims a return of the property, he becomes a plaintiff as well as a defendant. (Morris on Replevin, 136; *Reed v. Carpenter*, 2 Ohio, 87.)

II. If any facts material to the case occur after the original pleadings are filed, they may be set up in a supplemental answer or complaint. (1 Van Santvoord's Pl. 382, 610, 614; 2 Wail's Pr. 467, 472; *Candler v. Petit*, 1 Paige, 168; *Eager v. Price*, 2 Paige, 337; *Garth v. Everett*, 16 Mo. 493; *Hall v. Olney*, 65 Barb. 27.)

III. The owner of the ewe sheep is also the owner of the offspring (2 Wend. Bl. 390; *Tyson v. Simpson*, 2 Haywood, N. C. 321; *Williamson v. Daniel*, 12 Wheaton, 568); and both must be included in the same judgment (*Jordan v. Thomas*, 31 Miss. 557; *Seay v. Bacon*, 4 Sneed, 99; *Garth*

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v. *Everett*, 16 Mo. 490; *McVaughers v. Elder*, 2 Brevard, S. C., 7.)

IV. In ordinary actions of claim and delivery of personal property where no malicious taking or detaining is shown, legal interest may be the rule for damages; but in cases like this, where the plaintiff has no excuse or color of right or title, a jury is justified in awarding exemplary damages against plaintiff.

V. A *tortfeasor* is not entitled to compensation for the care of the property whilst in his possession. (*Garth v. Everett*, 16 Mo. 490, and cases cited.)

VI. The court did not err in refusing a continuance. (*Pilot Rock C. C. Co. v. Chapman*, 11 Cal. 162; *People v. Gaunt*, 23 Cal. 157; *State v. Flaherty*, 7 Nev. 153.)

VII. The court did not err in allowing the witness Short to testify to the value of the sheep left behind by Henry Buckley on his way to Nevada. (*Hastings v. Jackson*, 46 Cal. 234.)

VIII. The account book of the deceased was admissible in evidence. (*Plumer Dodge, Adm'r, v. Morse*, 3 N. H. 232; *Odell v. Culbert*, 9 Watts & Serg, 66; 1 Greenl. on Ev. 118, note 1, and cases cited.)

By the Court, LEONARD, J.:

This appeal is from a judgment and an order overruling appellant's motion for a new trial. In addition to the facts shown in a former report (9 Nev. 373), the following should be stated: After the cause was remanded by this court for a new trial, in September, 1874, defendant, by leave of the court, on the fifth day of October, 1874, and the eighteenth day of June, 1875, filed supplemental answers, alleging that the original band of ewes replevied by plaintiff in November, 1873, by breeding subsequent to the last-mentioned date, had been increased by a large number of lambs, to wit: four thousand, of the value of two dollars and fifty cents each, and of the aggregate value of ten thousand dollars, United States gold coin; also, that during the same time plaintiff had shorn from the band twenty-eight thousand five hundred pounds of wool, of which twelve thousand

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five hundred pounds, mentioned in the first supplemental answer, were alleged to be of the value of thirty cents a pound, and sixteen thousand pounds, mentioned in the second supplemental answer, were of the value of twenty-five cents a pound, and of the aggregate value of seven thousand seven hundred and fifty dollars, United States gold coin. In the original answer, defendant, claiming to be the owner of the band, demanded return to her of the two thousand three hundred and seventy sheep described in plaintiff's complaint, together with their increase, or, in case a return could not be had, judgment for their value in the sum of seven thousand one hundred and ten dollars, and damages for taking and detention in the amount of interest on such value at the rate of ten per cent. per annum from the taking until their return, or payment for their value, and her costs and general relief in the premises.

In the supplemental answers, defendant demanded judgment for a return of the lambs and wool, or their value as alleged, if a return could not be had, in addition to her demand in the original answer.

Plaintiff objected to the filing of the supplemental answers for various reasons stated, and excepted to the rulings of the court permitting them to be filed. The court refused to strike them out on motion, and permitted defendant to introduce evidence in support of them.

The court, of its own motion, instructed the jury as follows: "If the jury find for the defendant in this case, they will consider and find the following matters:

"First: How many sheep were taken by S. Buckley, the plaintiff in this case, from Mrs. A. Buckley, the defendant?

"Second: How many of these were the property of defendant, if any?

"Third: What was the value of the sheep mentioned in the original complaint, and taken, if any were taken?

"Fourth: What has been the number of increase of the original sheep taken, for the years 1874 and 1875?

"Fifth: How many pounds of wool were shorn from the sheep in controversy since the taking by plaintiff in 1873, for the years 1874 and 1875, and how much was the wool worth at the time and place of shearing?

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“If you find for the defendant, you will find the number of sheep which the defendant is entitled to have returned, and the value of such sheep; also, the number of pounds and the value of the wool shorn in the years 1874 and 1875 from the sheep in controversy.”

Plaintiff excepted to the giving of the foregoing instructions, also to the rulings of the court admitting evidence in support of the supplemental answers.

The jury found that the defendant was entitled to have the following property returned, and fixed its value as follows, to wit:

2370 sheep, at \$3.....	\$7110.00
2500 lambs, increase on old stock.....	4668.00
17,629 pounds of wool at 25 cts	4407.25

Making a total value of.....\$16,185 25

Judgment was rendered for defendant for the return of the two thousand three hundred and seventy sheep, and in case delivery thereof could not be had, for their value, seven thousand one hundred and ten dollars; also, for the return of the two thousand five hundred lambs, being the increase subsequent to the commencement of this action and the possession thereof by plaintiff, or the sum of four thousand six hundred and sixty-eight dollars, their value, in case a return could not be had; also, for the return of the seventeen thousand six hundred and twenty-nine pounds of wool shorn from the band during its possession by plaintiff, or the sum of four thousand four hundred and seven dollars and twenty-five cents, its value, if a return could not be had, besides costs.

Upon the trial, plaintiff offered and endeavored to prove the necessary cost and expenses of keeping and preserving the band, raising the lambs, shearing and marketing the wool, etc., from the thirteenth of November, 1873, when plaintiff took possession of the original band, until the time of trial.

Defendant objected to such proof, and the court sustained the objection, plaintiff excepting. Among the many assignments of error contained in the transcript, appellant espe-

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cially urges as error the action of the court in permitting respondent to file the supplemental answers; its refusal to strike them out; the admission of evidence in their support; the instructions above quoted, and the refusal of the court to permit appellant's proof of his proper, necessary expenses.

A careful consideration of these several assignments will necessarily involve a discussion of questions of the first importance, affecting matters of practice as well as the rights of property; questions upon which courts of the highest respectability and intelligence have differed, and upon which they do not now agree. In no branch of the law has there been greater contrariety of opinions than upon the proper rules of computation by which a just amount of indemnity for the wrongful taking of personal property may be ascertained. The section of the statute which defines the rights of parties is, itself, in some respects, difficult of exact comprehension, and the facts and circumstances of the many cases that must be brought within and controlled by its provisions, are so different that courts have always found in this class of cases questions not easily solved. The case in hand presents, at least, its share of difficulties.

Section 202 of the civil practice act provides that, "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for the detention, or the value of the use thereof. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for the return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same, or the value of the use thereof."

It is said in the case of *Lambert v. McFarland* (2 Nev. 59), that the primary object of this action is the recovery of the property, and judgment for its value in damages is only authorized when a delivery of the property itself cannot be had.

It is true that judgment for the value of the property is

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only authorized in case delivery of the property itself cannot be had; but it is also true that, in a proper case, damages for detention, or for taking and withholding the property, or the value of its use, may be awarded to the prevailing party, whether a return can be had or not. By this action, the law intends to give a complete remedy to the party entitled to possession, not only as to the property itself, but also in respect to damages which are the natural result of the wrongful act; and, therefore, it provides full compensation for the injury, by granting a return of the property to the rightful owner, or its value, if a return cannot be had, and at the same time legal damages. (*Burrage v. Melson et ux.* 48 Miss. 244.)

It is evident to our minds that recovery of damages in a proper case is as much a primary object in an action of this kind as is the recovery of the property in specie; and that the prevailing party should be permitted to maintain his rights in respect to damages, on account of a wrongful taking and detention, as well as his rights in relation to the property itself. As we understand counsel for appellant, it is claimed that the court erred in permitting respondent to file supplemental answers, and to sustain them by proof, because neither the lambs nor the wool had an existence at the time the action was commenced, and, therefore, were not proper subjects of litigation in this action brought to recover possession of the original flock.

It will not be denied that in an action of replevin it is not competent to the defendant, by his answer, to introduce a new and distinct subject-matter of litigation by claiming of the plaintiff the release and return of other and distinct personal property, nor could he properly claim or recover damages for taking or withholding such property, or for the value of its use.

But let us see if the rule of practice just stated applies to the case in hand. Although it is true that at the commencement of this action the original flock only was in existence, we have no doubt that their increase, and the wool subsequently shorn from the band, are also proper subjects of litigation in the same action. If the original

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band belongs to respondent, it is certain that she has rights in the lambs and wool, which the law will protect in this or a subsequent action. All the rights of the parties should be settled in one action, if this can be done without doing violence to well established rules of practice or going counter to the provisions of law. As a rule in actions of this character, and such is the case here, all, or nearly all, damages for detention, or for the use of the property, accrue after the defendant files his answer. In such cases he is unable to insert in his pleadings even a proper general allegation of damages; and certainly, in cases where he is obliged to plead special causes of damages, he oftentimes may be unable to frame his pleadings so as to obtain full compensation for his injury. And yet, the statute declares that he may have damages for taking and withholding the property, or the value of its use in every case. Notice the language of the statute: "If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same, or the value of the use thereof." It is plain that the "damages for taking and withholding" referred to are such as accrue after the action is commenced. They are damages which accrue after the property has been delivered to the plaintiff, and that can never be done until after the commencement of the action. So, aside from the general rule allowing damages accruing after the commencement of the action, where the subsequent damages are the mere incident or accessory of the principal thing demanded, or where no subsequent action can be maintained for them, it is plain that the statute, in a proper case, and with proper pleadings, permits judgment in favor of defendant for damages that accrue subsequent to the commencement of the action on account of a wrongful taking and withholding of the property in dispute by plaintiff. Admitting as a fact, then, that the original band belonged to respondent at the time they were replevied by appellant, as the jury found, and so continued until the trial, it follows that re-

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spondent was entitled to judgment for their return, if a return could be had; otherwise, their value, together with such damages as with their return in one case, or their value in the other, was necessary in order to completely indemnify her on account of the wrongful act of appellant. And under the maxim, *partus sequitur ventrem*, her rights relative to the increase were precisely the same as those just stated concerning the original flock. In *Newman v. Jackson* (12 Wheat. 570), the court say: "The issue is, we believe, universally considered as following the mother, unless they are separated from each other by the terms of the instrument which disposes of the mother." And in *Seay v. Bacon* (4 Sneed. 103), it is said: "By our law, the issue of the female slave follows the condition of the mother. The children are a part of the mother, and potentially exist in her before they have a being. The ownership of the mother carries with it the property in the children born of her during the period of such ownership. The mother and her issue are treated, in respect to the title and rights of the owner, as an aggregate property. Whatever affects the rights or remedies of the owner as respects the mother equally affects his rights and remedies in respect to her issue."

The case of *Jordan v. Thomas* (31 Miss 558), was an action for the recovery of a slave named Hannah and her child John, and her future increase. The complaint alleged the value of Hannah and John was two thousand dollars. John was born after defendant was possessed of Hannah, and before commencement of the action; but subsequent to its commencement Hannah gave birth to another child. Plaintiff recovered judgment for the three slaves. Defendant appealed, and urged as error the awarding of a slave to plaintiff not embraced in the issue. He also contended that this child, not having an existence at the commencement of the suit, could neither then give the plaintiff a cause of action, nor constitute part of the subject of litigation.

The court say: "It may be true, as a general proposition, that things which did not exist at the commencement of the

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suit could not be embraced in the judgment of the court. But this rule, however correct it may be as a general rule, can have no application to that which is merely an incident to the subject-matter of the suit. For instance, a suit may be commenced to enforce the payment of a debt the day after it is due. No interest has then accrued, yet interest is recovered, not that it existed when the suit was commenced, but because it is an incident to the subject-matter. So in regard to the hire of slaves, to recover which an action is brought; and indeed, we may say in regard to everything which is but an incident, or profits accruing pending the litigation. When, therefore, the jury determined the plaintiff's rights to the slave, they at the same time determined that which was incidental to the right. The title to the mother carried with it a title to her offspring when born. Having a right to recover the mother, the plaintiff could recover that which the mother produced pending the suit, and the only question which could arise would be, whether it was even necessary to name the offspring in the judgment of the court."

See, also, *McVaughers v. Elder* (2 Brevard, S. C. 12), and *Tyson v. Simpson* (2 Haywood, N. C. 321), wherein it was decided that upon the question under consideration, there was no distinction at that time, as objects of property, between negroes and domestic animals.

But respondent could not recover a valid judgment for the wool itself, for the reason that the moment it was shorn it became separate, independent property; and thereafter, in this action, brought prior to shearing to recover the sheep, etc., it could no more be recovered in specie than could wool shorn from other sheep belonging to respondent, but in the wrongful possession of appellant.

As to the wool, respondent's remedy was judgment in damages for taking and withholding the sheep, or for the value of their use. If the property sued for had been milch cows, it would hardly be claimed that judgment for a return of their milk, or the butter or cheese made therefrom, would be proper in an action to recover the cows. In that case respondent's remedy would have been judgment in

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damages for taking and withholding the cows, or for the value of their use. It is equally so in this case as to the wool.

Briefly stated, then, conceding the verdict of the jury to be correct as to the ownership of the original flock, respondent was entitled to a judgment for the return of them, and the increase if a return could be had, together with such damages as were necessary, if any, with the return, to indemnify her for all certain, actual losses sustained on account of the unlawful taking and withholding, or on account of the use of the sheep.

If a return could not be had, she was entitled to judgment for the value of such portion of the original band and increase as appellant was bound to return or pay for, together with such damages as were necessary, with the value, to indemnify her for all certain, actual losses sustained.

As to the proper method of ascertaining and computing damages (no question being raised as to the value of the original flock, or the increase, or as to the proper time when the value should be fixed), we shall speak hereafter.

Nor are we called upon to decide whether or not the natural losses of sheep, from year to year, should be deducted in ascertaining the number to be returned, or their value in case a return cannot be had, for the reason that testimony as to such losses was admitted by the court, and respondent concedes that such deduction should be made. We do not, therefore, consider this question.

Such, then, having been the rights of respondent, it was the privilege and duty of the court to permit any amendments, or supplemental pleadings that were permissible under well-established rules, and were necessary for the protection of the rights of the respective parties.

All the facts alleged in the supplemental answers occurred after the original answer was filed, and respondent could not, at that time, have known them. They were all consistent with, and in aid of the case made by the original answer. They did not bring into the case any new cause of action, or any controversy that was not, in fact, included in the issue originally made. Under such circumstances,

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supplemental pleadings should be allowed. (Sedgwick on Meas. Dam. 124; *Graves v. Niles*, Har. Ch. (Mich.) 333; *Ramey v. Green*, 18 Ala. 771; *Watson v. Thibou*, 17 Abb. Pr. 184; *Hoyt v. Sheldon*, 4 Abb. Pr. 59; *Rundle v. Little*, 6 Adol. & Ellis, N. S. 176; *Boyd v. Weeks*, 2 Denio, 321; *Bristol Manufact. Co. v. Gridley*, 28 Conn. 212.)

There is yet another reason why supplemental answers were proper. It is well settled that damages which necessarily result from a wrongful act may be shown and recovered under the *ad damnum* or general allegation of damages, for the reason that the opposite party must be presumed to be aware of the necessary consequences of his conduct, and therefore will not be taken by surprise in the proof of them. But damages which are the natural, but not the necessary consequences of the act complained of, must be particularly specified, or evidence of them will not be permitted at the trial. (2 Greenl. Ev. 232 *et seq.*) And although it is frequently much more difficult to apply the rule to the many cases that arise than it is to understand it in general terms, it is always safer to plead specially in cases of doubt. We are of the opinion that the damages allowable to respondent on account of the loss of wool were special in their nature, and should, therefore, have been particularly specified. (*Teagarden v. Hetfield*, 11 Ind. 522; *Stevenson v. Smith*, 28 Cal. 104; *Adams v. Barry*, 10 Gray, Mass. 361; *Parker v. City of Lowell*, 11 Gray, 358; Sedg. on Meas. Dam. 730 *et seq.*) The proper, particular specifications were necessarily made by supplemental answers. They could not have been made by amendment.

It is true that respondent asked a return of the wool in specie if a return could be had, otherwise its value, instead of judgment in damages for taking and withholding the sheep or the value of their use; but that fact was no obstacle against her receiving whatever relief she was entitled to demand under the facts alleged in the pleadings and established by proof.

It follows, therefore, that the court did not err in permitting the supplemental answers to be filed, nor in refusing to strike them out, nor in admitting any legal evidence un-

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der them which tended to establish the rights of the respective parties.

We now come to the last assignments above mentioned: The jury was instructed to find the increase of the original band for the years 1874 and 1875; also the number of pounds of wool shorn from the whole band subsequent to the time they were taken by plaintiff in 1873, for the years 1874 and 1875; also, the value of the wool at the time and place of shearing; also, the number of sheep which defendant was entitled to have returned and their value. Plaintiff was not permitted to prove the value of his labor and expenditure, and the jury found a verdict as already stated.

It is claimed by respondent that, notwithstanding the refusal of the court to allow testimony showing the amount and value of appellant's labor and expenses, and notwithstanding the instructions of the court, the jury did, in fact, make liberal allowances for all of appellant's care, labor and expenses, and that if the court erred the jury made full amends therefor. We can only say in reply that if they did so, the record does not disclose the fact to our satisfaction; and further, if they did so, they acted contrary to the spirit of the fourth and fifth instructions, and in the absence of testimony offered but rejected at the trial. In cases of this character, it seldom, if ever, happens that exact justice can be meted out to both parties, but we think it may be regarded as settled by reason and authority that, in the absence of fraud, intended wrong or willful negligence, the aim of the law is to compensate the injured party for his loss as nearly as possible, and not to inflict punitive penalties upon the wrong-doer.

What the rule may be where the elements of fraud, malice and wrong accompany the taking, it is unnecessary to inquire, for in this case no facts appear which take it out of the general rule stated. We find no evidence that in commencing the action and taking possession of the original band, according to the forms of law, or the subsequent retention of the property in controversy, appellant was actuated by any improper motive, or that he intentionally committed a wrong upon respondent. And, conceding that the

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verdict of the jury is correct as to the ownership and consequent right of possession of the sheep in question, we can only conclude that appellant was innocently in error as to his rights, and that the commencement of this action and the taking and retaining possession of the property was but an honest assertion of a supposed claim. (*Single v. Schneider*, 24 Wis. 301.)

Upon the question of “damages for taking and withholding the property, or the value of its use,” we shall therefore consider the case stripped of all elements of aggravation on the part of appellant.

What, then, were the rights of the respective parties in the matter of damages, considering the value of the property in dispute as found by the jury, satisfactory to both parties?

In cases where exemplary damages cannot be awarded, and the value of the property in dispute has been appreciated by the labor and expenditure of the unsuccessful party, the extreme doctrines enunciated are, on one side, that the full measure of relief is the value at the time of conversion, and interest on such value until trial or judgment, as damages, if the property cannot be returned; and on the other side, that it is at least the value of the property in its improved condition, without any deduction for necessary labor and expenditure in changing its condition and increasing its value. The latter view, it seems, was entertained by the court below at the trial of this cause, but we think erroneously. The first theory, if carried out, in many instances fully indemnifies the injured party; but in others it falls far short of adequate compensation. (*McBain et al. v. Austin*, 16 Wis. 87.) The second, as in this case, frequently makes more than indemnification to the injured party at the expense of the wrong-doer.

The law aims to make good the certain, natural and proximate losses of the one, but there it stops, unless, after full compensation is made, there yet remains in the hands of the other a pecuniary benefit or profit. In such case, we think with the court in *Suydam v. Jenkins* (3 Sandf. 624), the wrong-doer should be required to pay beyond indemni-

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fication to the extent of his gains. No person should be permitted to enrich himself by the wrongful use of another's property, no matter how innocent his intentions may have been in taking and withholding it; and, certainly, if he has acted in good faith, with equal truth it may be said that he should not be compelled, at a personal sacrifice, to pay beyond the actual damage sustained in consequence of his conduct. This case is, in many respects, analogous to that class of cases above referred to, where the property honestly, but wrongfully converted, has been improved, and its intrinsic value enhanced, by the labor and expenditure of a wrong-doer. The value of the band at the time of trial was much greater than that of the original flock, and the value of the wool being added, the difference is increased still more. In such cases, it is by no means an unvarying rule, in trover even, to give to the successful party the benefit of the proper necessary labor and expenditure of the other in addition to his real damages; and in replevin, when punitive damages are not allowable, if a return cannot be had, the rule very generally adopted, and certainly the one most consonant with the principle of awarding complete indemnity to the owner, and doing no injustice to the wrong-doer, is to allow the latter, out of the enhanced value, all of his legitimate outlay, or such portion as remains after the indemnification of the former is assured. There are reported cases which not only give to the rightful owner the property itself, in its improved state, if a return can be had, but also its enhanced value if it cannot be returned, without any deduction for the expenditure of the wrong-doer after the true owner has been fully compensated for his actual damages. To this rule we cannot give our concurrence in cases like this, for it would confer upon one party more than he can in justice demand, and take from the other that which he has a right to call his own.

It is generally and perhaps always true, so long as identification is practicable, or until the original property taken becomes of insignificant importance in comparison with the article in its improved and altered condition, that the owner is entitled to that of which he has been wrongfully de-

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prived without making compensation to the wrong-doer for his expenditure, for the reason that as a rule the property to which he is entitled and of which he has been deprived without fault on his part, cannot be separated from that portion which is not in fact his, and in order to obtain the former he is compelled to take the latter. Under such circumstances, the wrong-doer must lose and the rightful owner gain. But when compensation in money is to be given for the property taken, together with damages for taking and withholding the same, or for the value of its use, a different rule in reason and justice should, and in our opinion does, obtain, by great weight of authorities. In such case, the rights of the respective parties can and should be protected. (*Single v. Schneider*, 24 Wis. 300; *Single v. Schneider*, 30 Wis. 570; *Hungerford v. Redford*, 29 Wis. 345; *Suydam v. Jenkins*, 3 Sandf. 614; *Moody v. Whitney*, 38 Me. 178; *Hyde v. Cookson*, 21 Barb. 103; *Wetherbee v. Green*, 22 Mich. 311; *Herdic v. Young*, 55 Pa. St. 178; *Curtis v. Ward*, 20 Conn. 206; Note a to *Baker v. Wheeler*, 8 Wend. 508; Sedgwick on Meas. Dam. 501, and Note 3.)

Applying these principles to this case, if a return could not be had, and considering respondent's admissions as to losses of sheep from year to year, she was entitled to judgment for the value of the original flock and their increase less such losses, together with a sum equal to the amount of legal interest upon such values from the time appellant became possessed of the original band and the increase respectively as damage for taking and withholding the property or for the value of its use; for to this much at least the rightful owner is always entitled in an action of this kind. From the balance of the value of the entire flock and the wool at the time of trial, if in the possession of appellant, and if not, the amount received therefor by him, or the amount he could have received, appellant was entitled to deduct his proper legitimate expenses in the care and support of the sheep, their shearing and the disposition of the wool; and the remainder, if any, should have been added as damages to the amount already deducted equal to interest, making

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respondent's entire damages for the taking and withholding of the sheep, or for the value of their use.

If a return could have been had, it should have been left to the jury to decide according to the principles herein stated, whether or not respondent, in addition to a return, was entitled to damages, and, if so, the amount.

If the value of the flock to be returned was less at the time of the trial than the aggregate value of the original band and the increase (the necessary losses being deducted), together with legal interest upon the value of the original band and of the increase from the time appellant became possessed of each respectively until the trial, then certainly she was entitled to the difference in addition to a return, and after deducting such difference, if any, from the value of the wool, appellant should have been allowed from the balance his proper, necessary expenditure, and the remainder, if any, added to the difference just stated, should have been awarded to respondent as damages.

Several assignments of minor importance yet demand consideration. At the trial, one Irwin J. Buckley, a witness for appellant, testified in chief that Henry A. Buckley, deceased, when alive, told witness that while driving a portion of the sheep in dispute to Buckley's meadows in June, 1871, he lost some five hundred and fifty at or near a place called the "Boneyard," a rough country where the roads were bad and where sheep might scatter and get lost; that he did not think Henry tried to find the lost sheep.

On cross-examination, counsel for respondent asked the witness this question: "What would have been the reasonable value of those five hundred and fifty sheep left behind by Henry A. Buckley at that time?" Counsel for appellant objected on the ground, among others, that it was not in cross-examination of anything brought out by him. The objection was overruled by the court and an exception taken.

Counsel for respondent urged that the question was material and proper, as tending to show the great improbability of Henry leaving five hundred and fifty sheep behind him. We fail to see how it would tend to show such fact.

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It might have had a tendency to show that he would not have intended to leave them, but certainly it could not, in the slightest degree, show that he did not do so.

Witness had testified as to what the deceased told him concerning the loss, and the question objected to called for the individual judgment of the witness upon a subject not alluded to on the principal examination. We are unable to see how an answer to this question would have "contradicted, weakened or modified any testimony the witness had given on his direct examination, or any inference which might have resulted from it tending in any degree to support his case."

If respondent wished to prove the value, she should have made the witness her own. (Greenlf. Ev., vol. 1, sec. 445; *Phil. & Tren. R. R. Co. v. Stimpson*, 14 Peters U. S. 461; *Landsberger v. Gorham*, 5 Cal. 452; *Wetherbee v. Dunn*, 32 Cal. 108.)

We agree with the court in *Jackson v. Feather River Water Co.* (14 Cal. 24), and in *Ferguson v. Rutherford* (7 Nev. 391), that cross-examination ought to be allowed a free range within the subject-matter of the evidence in chief, but if it ranges outside of that there is error. The objection should have been sustained.

Appellant also urges that the court erred in admitting in evidence a certain account book belonging to respondent, who testified that it belonged to Henry A. Buckley when alive, and that it was the book in which he kept his accounts; that the handwriting therein was principally Henry's, the rest being the handwriting of witness; that the entries were made at or about the time the transactions to which they referred occurred; that it was the book by which Henry settled with persons with whom he had business, and that the entries in regard to the number of sheep received from appellant and returned to him were made by Henry at the time those transactions occurred.

Counsel for appellant objected to the admission of the book in evidence for various reasons stated, but made no objection to any particular entry, nor did they move to strike out any part after the book was admitted. Respond-

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ent testified positively in corroboration of the entries touching this case. We are of the opinion that the preliminary proof was sufficient to justify the court in permitting the book to go before the jury. (Greenleaf on Ev., vol. 1, sec. 118 *et seq.*; *McLellan, Adm'r, v. Crofton, Ex'r*, 6 Greenleaf, Me. 307; *Doe dem. Patteshall v. Turford*, 3 Barn and Adol. 891; *Bentley's Adm'r v. Hollenback*, Wright, 169; *Odell v. Culbert*, 9 Watts and Serg. 66.) The memorandum on page "J"—"November 12, 1870, my band count 1600"—was, in fact, inadmissible, but no specific objection was made to that, and no motion was made to strike it out, nor was the court asked to instruct the jury to disregard it.

The record shows that one J. C. Cutting was subpoenaed as a witness by appellant, but that he failed to appear when called. The court then ordered respondent's counsel to proceed in the examination of their witnesses. The court ordered that Cutting be permitted to testify whenever he should appear. He subsequently came into court and testified. Appellant then called George Buckley, and proceeded to examine him generally, when respondent objected on the ground that plaintiff had closed his case with the exception of the examination of witness Cutting. The court sustained the objection, and in the absence of proof to the contrary, we are bound to presume in favor of its ruling, and conclude that appellant had closed his case with the exception stated. The last assignment of error urged is insufficiency of evidence to justify the verdict and judgment, and that they are against law. The testimony being conflicting as to the ownership of the property in dispute, we cannot disturb the judgment upon this point. In other respects we have already pointed out the errors affecting it.

The judgment and order appealed from are reversed and the cause remanded.

BEATTY, J., concurring:

I concur in the conclusion of the court that this judgment must be reversed; but, as I entertain a view of the case to some extent different from that of the court, I wish to indi-

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cate as briefly as possible what that view is without any attempt to elaborate the argument which I think sustains it.

I think it is a correct doctrine that he whose breeding ewes have been wrongfully taken may recover in specie not only the original flock but also their natural increase in an action brought before the birth of the young; and whether or not it is necessary in such case for the owner to file a supplemental complaint or answer setting up the fact of such natural increase, it is at least certain that, if he is permitted to do so, that fact furnishes no ground of complaint to the opposite party.

The principle from which this conclusion follows is, that the identity of the flock remains notwithstanding its natural increase and decrease; lambs may be born and old sheep may die, but the flock remains the identical thing it was in the beginning. If this is the principle, and I can conceive of no other, upon which a recovery of the flock in specie can be allowed, there are other consequences which also necessarily flow from its adoption. One is, that when proof of the value of the flock is made at the time of the trial, account must be taken, not only of the natural increase of the flock, but also of its natural decrease. If the value of the lambs is taken into account the value of the old sheep that have died from natural causes must be deducted. Up to this point I understand there is no difference between myself and the court. But I go further. The verdict of the jury in cases of this character, when it is in favor of the party out of possession of the property, must include a finding as to the value of the property and as to the damages of the owner on account of the taking and detention. This is what the jury has to decide, and it is all it has to decide. It is not called upon to determine, and it cannot determine whether a return of the property can be had or not, and it cannot, therefore, assess damages in one amount to fit the case of a return, and in another amount to fit the case where a return of the property cannot be had. The value of the property must be fixed in one sum without any alternative, and the amount of the damages must be fixed in one sum without any alternative. This I understand to be the

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law, and this, so far as I know, is the universal practice. I have seen no precedent for a judgment awarding damages in one amount to be recovered with the property and damages in a different amount to be recovered with its assessed value in case a return of the property cannot be had.

If this is so, it follows that the jury must take into consideration the condition and value of the property at some particular point of time, assess its value at that time, and then fix the damages in a sum which will compensate the owner, whether he gets them along with the property or its value.

At what time then is the condition and value of the property to be estimated? It has been twice decided in this court, and, as I think, correctly decided, that the condition of the property at the time of the trial can alone be considered in assessing its value—its value at the date of the trial is the value which the jury must fix by its verdict. (*Bericich v. Marye*, 9 Nev. 312; *O'Meara v. North American Mining Company*, 2 Nev. 112.) Applying the rule of those decisions to this case, it appears clear to my mind that the jury should have assessed the value of this flock of sheep in its condition at the time of the trial. In doing so, they were bound to make allowance not only for the natural losses by the death of the old sheep, but for the actual decrease of the flock from whatever cause—accident, sales or willful destruction by the wrong-doer. The only flock of sheep that could be returned was the actual flock in existence and capable of identification; and the only value that could be assessed to be recovered as an alternative, in case a return could not be had, was the value of that actual flock. To hold otherwise would lead to this consequence: Either that the damages would have to be assessed in two different sums—one to be recovered in case the property was returned, and the other in case it was not returned—or else the amount actually received by the defendant would vary according to her ability or inability to find and identify her sheep, or according to the choice of the plaintiff to return the property or pay its assessed value. To my mind, it seems to be an absurd conclusion that the amount of com-

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pensation to be recovered by the injured party in cases of this kind is to be left to depend on his good or bad luck after judgment; and, as for a judgment for damages in alternative amounts, there is, as I have said, no precedent for such a judgment, to my knowledge, and there is no provision for such a judgment in the statute.

Assuming, then, that the duty of the jury was to find the value of the flock, as it existed, capable of identification, at the time of the trial, the other special finding which they were required to make was the damage which the defendant had suffered by reason of the taking and detention of the property.

Her damages consisted, in case the value of the flock at the time of the trial was less than that of the original flock at the time of the taking, of the amount of such depreciation, plus the interest on the original value, or of the amount of the depreciation plus the value of the use of the flock, if that was proved to be greater than the amount of the interest. In case the value of the flock at the time of the trial was greater than that of the original flock at the time of the taking, then her damages would have been the amount of legal interest, or the value of the use of the flocks, if that was greater than interest, less the amount of appreciation in the value of the property. If the value of the flock at the time of the trial was greater than its original value, together with interest or the value of its use, then she was entitled to no damages.

It is at this point that the widest divergence of opinion occurs between myself and the court. We are entirely agreed that the rule of the statute is plain; that aside from such special damages as may be recovered for depreciation in the value of the property between the time of taking and the trial, the owner is not entitled to recover both interest on its value and the value of its use. We agree that he may have interest at least, and, if he proves that the value of the use is greater than interest, that he may recover that in the place of, but not in addition to, interest. What we differ about is the practical operation of the rule announced in the majority opinion, that the defendant, if she

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was the owner of the sheep, was entitled to recover at least the value of the original flock and of the increase, together with interest on such values. In my opinion this is allowing double damages—interest and value of use. The increase of a flock by breeding is a part of the use of the flock, just as much as the shearing of the wool is a part of the use. He who gets the increase gets the value of the use as much as he who gets the wool that is shorn. Interest is allowed as damages on the theory that the owner might have sold his property and invested the value at interest; the value of the use is allowed upon the theory that he would have kept his property and got the advantage of its use. He is allowed in claiming damages to take either position, but he cannot take both. No man can sell his flock and invest the proceeds at interest and at the same time keep his flock and get the increase. I say, therefore, that it in an action of this kind the owner bases any claim for damages on the value of the increase he must abandon any claim of interest. Because the findings of the jury and the rulings of the district court were in several particulars at variance with these views, I concur in the judgment of reversal.

[No. 825.]

FRANK BOSKOWITZ, RESPONDENT, v. GEORGE T. DAVIS, MICHAEL E. SPOONER, CHARLES PATON, AND JOHN E. FREEMAN, APPELLANTS.

TRUST—WHEN MAY BE PROVED BY PAROL.—A trust concerning lands created by act or operation of law may be proven by parol.

RESULTING TRUSTS—PURCHASE OF LAND.—If land is purchased in the name of one person and the consideration paid by another, at the time the title is acquired, there is a resulting trust in favor of the latter.

IDEM—WHEN MONEY MUST BE PAID.—In order to establish a resulting trust for the payment of the purchase money, it must be shown that it was paid at the time the title passed.

IDEM—TENANTS IN COMMON—PURCHASE OF OUTSTANDING TITLE.—Where the possessory title to land is purchased by five tenants in common, and afterward one of the co-tenants purchased the title in fee, and it was sought by four of the co-tenants to exclude Rowland, the other co-tenant, who owned one-sixth of the possessory title, from the proceeds derived from

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the sale of the lands: *Held*, that the law raised a resulting trust in favor of Rowland to the extent of a one-sixth interest, independent of the intention of the parties, and forced it upon the consciences of his associates by operation of law.

IDEM—PAYMENT OF EXPENSES.—A trustee should be allowed all proper expenses incurred in the discharge of his duties; and a tenant in common who acquires an outstanding title beneficial to his co-tenant should be fully recompensed before a court requires him to convey to his co-tenant.

WHEN TENDER OF EXPENSES NEED NOT BE MADE.—If, at the time of the commencement of an action to recover the proceeds of the sale of the trust property, there is more trust-money in the hands of the defendants than is sufficient to pay all the expenditures, there is in such a case no reason for the rule requiring the *cestui que trust* to tender his portion of the expenses.

NAKED TRUSTEES AND PURCHASERS OF AN EQUITABLE INTEREST ARE NOT ENTITLED TO NOTICE.—The defense of being a purchaser for value without notice does not apply to a mere naked trustee, who holds the title for the parties beneficially interested; nor to any person claiming an equitable interest in the lands.

WHEN OBJECTIONS MUST BE MADE.—Appellants cannot complain of the action of the court in striking out the answers of a witness that are not responsive to the questions asked, unless objection is made and the right to have proper answers given insisted upon in the court below.

CONFLICT OF EVIDENCE—FINDINGS.—The findings of the court will not be disturbed where the evidence is conflicting.

TENANTS IN COMMON—PAYMENT OF PURCHASE MONEY.—Where one tenant in common purchases an outstanding title for the benefit of his co-tenants; the latter must within a reasonable time contribute, or offer to contribute, their proportion of the purchase money; but this principle does not apply when the purchaser does not desire to be paid, and conveys to his co-tenants the idea that they need not pay until convenient.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion of the court.

Robert M. Clarke, for Appellants:

I. The court erred in permitting proof of parol contract for sale of land, and in enforcing such alleged contract where the purchase money was not paid. (21 Cal. 99; L. C. Equity, 200-3; 38 Cal. 191; 16 Vt. 500; 40 Cal. 634; 3 Sumner, 435; 4 Nev. 280, 292-3; 7 Barb. 59; 5 Nev. 394-5; 2 Jh. Ch. 405; Penyon Trusts, vol. 1, sec. 133, p. 144; 5 Jh. Ch. 552; 109 Mass. 422; 60 Ill. 516; 97 Mass. 87; 17 Wallace, 44, 59, 60; 53 Me. 403; 63 Penn. 335; 53 Ill. 223; 13 Ill.

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634; 28 Mo. 249; Laws of Trusts and Trustees, 31.) At best plaintiff's interest is only in proportion of one hundred and twenty-five dollars, the amount paid by him for possessory title, to the whole cost of the land. But this is no *aliquot* part of the whole, and cannot be considered.

II. Plaintiff made no tender of money due, and therefore has no standing in court.

III. Paton and Freeman were purchasers without notice, and could not be bound by any secret trust.

IV. The court erred in striking out the answers of Rowland, which tended to show that no contract was made as to the fee, and that no money was advanced or loaned to him.

Ellis & King, for Respondent:

I. The statute of frauds has no embarrassing application to this case. The lands mentioned in the pleadings might be treated as so much merchandise belonging to the parties to the enterprise, and so dealt with.

II. No notice to Freeman or Paton was necessary. Freeman never had any beneficial interest in any feature of the enterprise, and the only interest Paton ever had or acquired was by purchase or admission into the original copartnership of Spooner and Lockie, and this firm had full notice.

III. Plaintiff was not required to make any tender in face of the fact that defendants by the hands of Paton tendered to plaintiff a statement between themselves and plaintiff's grantor, showing a balance due Rowland.

IV. If the action was to enforce a trust in lands, the right's of the plaintiff's would be fully established. (*Frederick v. Haas*, 5 Nev. 389; *Sandfoss v. Jones*, 35 Cal. 481; *Millard v. Hathaway*, 27 Cal. 139; *Boyd v. McLean*, 1 John's Ch. 582.)

V. The complaint does not confine the land mentioned to the Harvey tract, but only says that in pursuance of the original agreement the possessory right to the Harvey tract was purchased, but nowhere confines the lands to which the fee was acquired to the Harvey tract.

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By the Court, LEONARD, J.:

On the twentieth day of August, 1872, and for some time prior thereto, defendant Davis and one George Gillson were partners in the ownership of timber lands, flumes, saw-mills, etc., and in the wood and lumber business in this state. At the same time, defendant Spooner and one John A. Lockie were partners in the ownership of the same kind of property and business. These two firms united and formed another partnership, and carried on their business under the firm name of Spooner, Lockie & Co., Spooner and Lockie owning one undivided half, and Davis and Gillson the other half of all the property of the last-mentioned firm. The firm of Spooner, Lockie & Co. owned other lands in the vicinity of the lands described in plaintiff's complaint, and were desirous of obtaining more. The lands described in the pleadings in this action were timber and grazing lands; but were chiefly valuable as timber lands. Prior to the twentieth day of August, 1872, they were claimed by one Harvey, who had a portion of them fenced, and a part was occupied by his tenant as a milk ranch. There was a milk-house and other improvements upon the land owned by Harvey. Harvey's title was possessory only, and the legal title was in the State of California, the land being situate in the county of El Dorado. On the date last stated, Harvey conveyed by a grant, bargain and sale deed, duly acknowledged, all the lands described in plaintiff's complaint to George T. Davis, Michael E. Spooner, John A. Lockie, George Gillson and T. B. Rowland. It was stipulated in the deed by the grantees that the interest of Davis & Gillson in said lands was an undivided five-twelfths, Spooner & Lockie five-twelfths, and Rowland two-twelfths. The consideration stated in the deed and actually paid was one thousand five hundred dollars; seven hundred and fifty dollars were paid at the date of the deed, of which sum Rowland paid one hundred and twenty-five dollars, and the other grantees paid in proportion to their interests. The further sum of three hundred dollars was paid from rent money due

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from Harvey's tenant which belonged to the grantees. The balance, four hundred and fifty dollars, was paid originally by Davis & Gillson, one-half of which was subsequently repaid by Spooner & Lockie. About the first of September following Harvey's conveyance, Gillson went to San Francisco for the purpose of purchasing scrip to lay upon this land to the end that the legal title might be secured. When he started he did not know, nor did any of the parties know, that he could obtain any scrip, or how much it would cost. On arriving at San Francisco, he obtained through Mr. J. W. Shanklin, an attorney-at-law, scrip sufficient in quantity to cover a large portion of the Harvey tract, and subsequently an additional amount was purchased. The scrip cost at the rate of three dollars and fifty cents per acre. It was necessary to take the scrip in the name of a resident of the State of California, and defendant John E. Freeman, having been selected, took the scrip in his own name. The scrip, in a word, was purchased by Shanklin in the direct employment of Gillson, and was taken in the name of Freeman, who paid the money of Davis & Gillson therefor. Neither Shanklin nor Freeman had any beneficial interest in the scrip or the land secured thereby. After Gillson's return to Carson, Spooner & Lockie were charged with one-half of the money paid out in obtaining the scrip, and Davis & Gillson the other half. The balance of four hundred and fifty dollars paid Harvey was charged in the same manner. Gillson, while testifying, stated his reasons for so entering these charges, which need not be repeated at this time.

Sometime in September following the purchase of the scrip, legal proceedings were had in Sacramento to remove certain jumpers from the land. Gillson, Lockie and Rowland were in attendance. Rowland borrowed money of Gillson to pay his expenses in part, which was charged to him on the books of Davis & Gillson, and was subsequently repaid by Rowland at the request of Davis. Other expenses of the trials, for witnesses, fees, etc., were charged equally to Davis & Gillson, and Spooner & Lockie. No other charge in relation to the lands was made against

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Rowland upon the books of Davis & Gillson, but he was not aware of the way the books were kept or the charges made. The title from the State of California was taken in the name of Freeman, where it remained until the property was sold to the Carson and Tahoe Lumber and Flume Company, in June or July, 1874, for the sum of eight dollars and sixty cents per acre, aggregating the sum of twenty thousand six hundred and forty dollars. Prior to the sale last mentioned, Gillson sold his interest in the firm of Davis & Gillson to defendant Davis, and Lockie sold his interest in the firm of Spooner and Lockie, including the interest in the firm of Spooner, Lockie & Co., to defendants Spooner and Paton, an undivided one-half to each, Paton agreeing to pay his proportion of the liabilities in place of Lockie.

This action was brought by plaintiff, the assignee of Rowland's interest, to recover one-sixth of the proceeds of the sale to the C. and T. L. and F. Co. Defendants did not deny receiving the proceeds, but they did deny every allegation of plaintiff's complaint tending to show that Rowland or plaintiff had any rights or interests in the lands in question, or the proceeds of their sale. They admitted, by failing to deny, that Lockie sold his interest in the lands described in the complaint to Spooner and Paton, and Gillson his interest to Davis, but denied that either Spooner, Paton or Davis purchased with knowledge of the facts alleged in the complaint, or with the knowledge that Rowland had any rights in the premises. They admitted the assignment to plaintiff from Rowland, as well as plaintiff's demand of his proportion of the proceeds of the sale to the C. and T. L. and F. Co., and defendant's refusal to pay him any portion thereof. It was admitted that defendants Davis, Spooner and Paton procured defendant Freeman to convey to the C. and T. L. and F. Co. All other material allegations of the complaint were denied. The cause was tried by the court without a jury, and the findings, which are in substantial accord with the material allegations of the complaint, are as follows:

"1. That this cause was commenced in this court by the

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filing of the complaint, and the issuance of a summons thereon, on the second day of March, A. D. 1875. * * *

2. That on or about the twentieth day of August, 1872, said defendants, Davis and Spooner, together with one Thomas Rowland, one John A. Lockie and one George Gillson, agreed verbally together to purchase and acquire from one C. W. Harvey, the possessory title to, and possession of, and from whomever and by whatever lawful means the title in fee to the same could be acquired, to acquire the title in fee of and to the lands mentioned and described in the complaint herein.

3. That afterward, and in pursuance of said agreement, and for the purpose of acquiring possession of, and title to said lands, said Davis, Spooner, Lockie, Gillson and Rowland, took and received a grant, bargain and sale deed of conveyance from said C. W. Harvey of said lands, and received possession of the same from said Harvey, said deed Exhibit "H;" that by the terms of said deed said Rowland purchased and owned two-twelfths of said land.

4. That said purchasers agreed with said Harvey to pay him one thousand five hundred dollars for said conveyance and the possession of said lands; that said purchasers paid him seven hundred and fifty dollars of said purchase money at the date of delivery of said deed. And the court finds that of said seven hundred and fifty dollars so paid Harvey, said Rowland contributed and paid at the time, of his own funds, one hundred and twenty-five dollars; that of the balance of said purchase money, then due said Harvey, seven hundred and fifty dollars, three hundred dollars were afterward paid him of rental due said purchasers for said lands, which was collected and retained by said Harvey by authority of said purchasers; that the remainder of said purchase money was advanced by said Gillson, of the moneys of said Davis & Gillson, for the common benefit of said purchasers.

5. That in further pursuance of said agreement between said purchasers, said Gillson, about August or September, 1872, visited San Francisco, California, for the purpose of obtaining title to said lands for said purchasers; that for

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that purpose Mr. Gillson purchased land scrip and warrants, and located the same upon said lands for said purchasers, whereby they acquired title to the same, some of which titles, if not all, were inchoate at the time of the sale of said lands hereinafter mentioned.

6. That in the purchase and pay for said land scrip and warrants, and the expense attending the location of the same, said Gillson used the credits and advanced moneys belonging to a copartnership composed of said Davis and Gillson as a loan to said purchasers.

7. That in order to locate said land scrip and warrants upon said lands, it was necessary to do so in the name of a citizen of the State of California, where the lands were situated, and for this purpose the name of said Freeman was used as a citizen of said state, without said Freeman then having any real interest in said lands.

8. That in purchasing said scrip and warrants, and in locating the same on said lands, said Gillson always acted for himself as a party to said agreement, and in behalf of his associates therein as their agent.

9. That said Rowland was the first of said purchasers that knew of said lands, their situation, value, etc., and first suggested their purchase to his said associates, and was the first to suggest the purchase and employment of land scrip and warrants to perfect their title to said lands.

10. That after said land scrip and warrants had been purchased, said purchasers in attempting to locate the same on said lands had some litigation with other parties claiming the same, and said Rowland, at his own expense, attended upon said litigation in the interest of said purchasers for that purpose, going from his residence in Lake Valley, California, to Sacramento, California, a very long and expensive trip.

11. That said Rowland afterward assisted in making the surveys necessary in making said locations as a party having an interest therein, at his own cost and expense.

12. That afterward, and before the sale of said lands hereafter mentioned, said Freeman and said Paton, with a full knowledge of all the facts hereinbefore found, acquired

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certain rights and interests in and to said lands, and in and to said land scrip and warrants, from said Davis, Gillson, Spooner and Lockie.

13. That afterward and before the sale of said lands hereinafter mentioned said Davis, Spooner, Freeman and Paton, with a full and particular knowledge of all the foregoing facts, purchased and acquired amongst them the full and entire interests of said Gillson and Lockie in and to all said lands and said land scrip and warrants.

14. That one of the terms and conditions of the agreement between said purchasers mentioned in the third finding herein, was that said Rowland should have one-sixth interest in said enterprise and purchase and in said lands, after title to the same was obtained in fee.

15. That the lands so purchased and always herein meant and referred to, amount to two thousand four hundred acres, as described in said complaint.

16. That the reasonable worth and value of said lands, at the time of the sale thereof, hereinafter mentioned, was eight dollars and sixty cents per acre in gold coin.

17. That afterward, before the beginning of this action, and on or about the fifteenth day of June, 1874, said Rowland sold and conveyed to said plaintiff, by name and style of Frank Bosko, all his right, title, interest and estate in and to said lands.

18. That afterward, and before the commencement of this action, to wit: on or about the ——— day of August, 1874, said defendants sold and conveyed said lands and said land scrip and warrants located upon the same, together with other lands, to the Carson and Tahoe Lumber and Fluming Company for sixty thousand dollars gold coin of the United States, and had and received from said Carson and Tahoe Lumber and Fluming Company said sum of sixty thousand dollars gold coin of the United States therefor.

19. That the amount which said defendants received for said lands, and the land scrip and warrants located upon the same, from said Carson and Tahoe Lumber and Fluming Company, was twenty thousand six hundred and forty

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dollars, being at the rate of eight dollars and sixty cents per acre for said two thousand four hundred acres.

20. That said lands, and the said land scrip and warrants located upon and representing the same, were, at the date of said sale thereof by said defendants, of the full and reasonable value of eight dollars and sixty cents, gold coin of the United States, per acre (per acre of land and per acre expressed in land scrip and warrants).

21. That on or about the — day of June, 1874, said Thomas Rowland sold and conveyed to said plaintiff all his right, title and interest in deed to said lands, and said plaintiff owned and possessed the same at the time of the conveyance thereof, and the transfer of said land scrip and warrants by said defendants to C. and T. L. and F. Co. as aforesaid.

22. That subsequent to said sale, transfer and conveyance of said lands, land scrip and warrants by said defendants as aforesaid, said defendants submitted to said plaintiff, as the successor in interest of said Rowland, a statement of account between said plaintiff and said defendants, arising out of said purchase and sale of said land, and at the same time tendered to said plaintiff the sum showed as balance due said plaintiff by said account, to wit: seven hundred and thirty-three dollars and twelve cents, and at the time upon said plaintiff's refusal to accept said tender, stated to said plaintiff that said money would be deposited in a bank to the credit of said plaintiff; that defendant subsequently tendered the plaintiff a further and additional sum, to wit: one thousand dollars gold coin of the United States, in satisfaction of his demand set up in this action.

23. That said defendants received all of said money from said C. and T. L. and F. Co., in July and August, 1874, and that said defendants have never paid said plaintiff any part of said money.

24. That in pursuance of said agreement, said purchasers purchased two thousand four hundred acres of land scrip and warrants at three dollars and fifty cents per acre, which, with other outlays, amount to eleven thousand and fifty-two dollars, including interest.

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25. That account Exhibit "B" filed in this cause, shows all the outlays in purchasing said lands, land scrip and warrants, and the attendant expenses, except the price of four hundred acres of scrip at three dollars and fifty cents per acre, hereby allowed in addition thereto.

As conclusions of law from the above facts, said court now finds as follows:

1. That said plaintiff is entitled to have and recover of and from the said defendants one-sixth of the remainder of said sum of twenty thousand six hundred and forty dollars in gold coin, after deducting therefrom the outlays in procuring said lands and the expenses attendant upon said joint enterprise, together with interest on said outlays and expenses at the rate of ten per cent. per annum from November 1, 1872, to September 1, 1874, allowing as the purchase price of all of said scrip and land warrants, three dollars and fifty cents per acre for the whole of said two thousand four hundred acres, with interest on said one-sixth remainder from the first day of September, 1874, to date and until paid, at the rate of ten per cent. per annum, together with the sums of one hundred and twenty-five dollars, paid by Rowland at the time of said purchase, and the sum of fifty dollars, the said Rowland's one-sixth of said rent, and the sum of sixty dollars, expenses incurred and paid by said Rowland at the city of Sacramento, in and about procuring said lands, with interest on said three last-mentioned sums, to wit: two hundred and thirty-five dollars from the first day of November, 1872, to date and until paid.

2. That said plaintiff is entitled to have judgment against defendants for the sum of one thousand seven hundred and fifteen dollars and fifty-five cents, in gold coin of the United States, together with his costs of suit.

Defendants moved for a new trial upon the grounds of errors in law occurring at the trial, insufficiency of evidence to support the findings and judgment, and that the findings and decision were contrary to the evidence, and against law. The motion for a new trial was denied, and this appeal is taken from the order denying such motion, and from

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the judgment. At the trial plaintiff was permitted to prove, by parol evidence, the contract alleged between Rowland, Davis & Gillson, and Spooner & Lockie, relative to acquiring title to the lands in question. Defendants objected on the grounds that the contract was not in writing, and that the same being for the purchase of lands was void under the statute of frauds. The action of the court permitting parol evidence of this agreement is first assigned as error. Counsel for appellants, at the argument, claimed that the court erred, because it was not shown that in purchasing the legal title Rowland, at the time, paid any portion of the purchase money, and it appeared that only a part of the purchase money for Harvey's interest was at the time of the purchase thereof, or subsequently, paid by Rowland. Counsel for respondent urged that the statute of frauds did not apply to this case, for the reason that the lands mentioned in the pleadings might be treated as so much merchandise belonging to the parties to the enterprise; that there was no necessity of establishing a trust as to the lands or the proceeds of their sale by appellants.

We shall consider the case from the standpoint that respondent was obliged to establish the same rights in the land before the sale to the C. and T. L. and F. Co. as would have been requisite had this action been for the recovery of a deed from appellants conveying an undivided one-sixth interest in the land, instead of the same fraction of the proceeds of its sale. We shall proceed upon the theory that respondent cannot recover in this action, if he could not have recovered his alleged interest in the lands themselves prior to the sale to the C. and T. L. and F. Co. had appellants denied his claim, and refused to recognize him as a joint owner.

It is admitted that a trust concerning lands created by act or operation of law, may be proven by parol just as it could have been before the statute of frauds was enacted; also, that if the estate is purchased in the name of one person, and the consideration paid by another at the time the title is acquired, there is a resulting trust in favor of the latter. These principles are well established. It is also

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just as true that in order to establish a resulting trust from the payment of the purchase money, it must be shown that it was paid at the time the title passed; that no subsequent payment will satisfy the statute.

It was claimed by respondent in the court below that the agreement between the grantees of the Harvey deed was to purchase the whole title, and that the deed from Harvey was only one step contemplated and agreed upon in the beginning, while defendants contended that the agreement was confined solely to the Harvey purchase; that the subsequent purchase of land scrip and warrants, and thereby obtaining title from the State of California, was an afterthought in which Rowland did not in any manner participate. Respondent contended also that, in pursuance of the understanding and agreement of the parties in the beginning, Gillson, as the authorized agent of all the others, and acting for himself, purchased the scrip and warrants for Rowland as well as his associates, and from the moneys of Davis & Gillson, advanced to Rowland his *pro rata* of the expense, and that, therefore, his portion of the purchase money was paid at the time. And although the findings upon these issues are claimed to be erroneous by appellants, and therefore that parol evidence of the agreement was inadmissible, it is not essential to consider them at this time in order to arrive at a satisfactory solution of the question involved in the objection under consideration, for the reason that the agreement was undoubtedly taken out of the operation of the statute by other facts and circumstances. It is said that parol evidence of the agreement was inadmissible, because the proofs show that Rowland did not at the time pay his proportion of the purchase money. But whether this be true or not, it should be remembered that payment of the purchase money is not a *sine qua non* in such a case, for prepayment is not the only method of creating a trust by act or operation of law. Certain other facts and circumstances establish it with equal certainty.

“Implied trusts are: First. Those which stand upon the presumed intention of the parties; Second. Those which are independent of any such intention and forced upon the

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conscience of the party by operation of law, as for example: In cases of meditated fraud, imposition, notice of an adverse equity, and other cases of similar nature." (2 Story's Eq. Jur. 435.)

The deed from Harvey shows, and, indeed, it is not denied, that Rowland was tenant in common with Davis & Gillson and Spooner & Lockie, in the land described in the deed, so far as the conveyance of Harvey's title and possession could make them so, and that under this deed he became the owner of an undivided one-sixth interest in Harvey's possessory title. But it is said that that title amounted to nothing; that the subsequent legal title lodged in Freeman in trust for Davis & Gillson and Spooner & Lockie, so absorbed it as to work its complete annihilation, and destroy all property rights theretofore acquired thereby. A better title than Harvey's was necessary in order that the land might be enjoyed to its fullest extent and under all circumstances, but the possessory title was valuable. It could have been bought and sold under execution, and defendants Spooner and Davis, as well as Gillson and Lockie, were anxious to get it and pay one thousand five hundred dollars for it. Evidently, it was supposed to be of especial value in obtaining the title in fee, and doubtless it was in fact so, for the reason that the statute provides that parties in possession, if otherwise qualified, shall be first entitled to receive the fee. And, too, the evidence shows that legal proceedings were had in Sacramento to remove jumpers from the lands applied for by Freeman, before the acquisition of the state's title. But passing these considerations, the prominent and important facts remain, that for a common purpose and with united effort, from a common source and by the same instrument, the five co-grantees in the Harvey deed, became thereby, and until sale to the C. and T. L. and F. Co. remained tenants in common in this land, with relations so intimate that neither could refuse the others their proper proportion of the proceeds in case of sale, whether of the possessory right or title in fee.

Under such circumstances the law raised a resulting trust

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in favor of Rowland to the extent of a one-sixth interest, independent of the intention of the parties, and forced it upon the consciences of his associates by operation of law. The authorities sustaining this conclusion are numerous. In the well-considered case of *Flagg v. Mann* (2 Sumner, 520), Justice Story uses this language, which is entirely applicable to the case in hand:

(“ We are next led to the consideration of another point in the defense which is directly brought forward in the answer. It is that the agreement, even if clearly made out in point of fact, is void in law, as a parol agreement respecting the purchase of lands within the purview of the statute of frauds of the State of Massachusetts, * * * which enacts that no action shall be maintained upon any contract or sale of lands, or any interest in or concerning the same unless the agreement is in writing. It seems not disputed at the bar that the present agreement falls within the predicament of the statute, unless it is extracted from it by the fact that some title was, at the time of the purchase from the Frye heirs, vested in Flagg and Mann, under the deed from Richardson to them, or that that deed connected with the agreement between Flagg and Mann, created, *per se*, a fiduciary relation which would make the purchase, by operation of law, a purchase of trust for their joint benefit. It is a well-known rule of the common law, that where two persons are in possession of lands by an imperfect, or even a tortious title, such as a title by disseisin, a release to one of them will inure for the benefit of both. * * * But the doctrines entertained on this subject by courts of equity are far more broad and comprehensive. They proceed upon the maxim of general justice * * * that if a purchase is made by parties so interested by mutual agreement, neither party can rightfully exclude the other from what was intended to be for the common benefit; and that if one of the parties, by private intrigue, seeks to obtain without contract, but in violation of his good faith to his co-tenants or partners, a private benefit to himself in things touching the common right, it is a fraud which shall turn him into a trustee for the benefit of all.” The court

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then quotes from Chancellor Kent, in *Van Horne v. Fonda* (5 Johns. Ch. 388, 407), wherein there was no agreement to obtain the original, together with the outstanding title, and adds: "The present case requires the application of principles of far less stringency and comprehensiveness. In the present case the community of interest (if any) arose from direct contract between the parties, and from a direct agreement not rescinded or abandoned, to purchase the original as well as the outstanding title upon their joint account. In such a case there would seem to be no room for doubt, that if the parties stood in the relation of cotenants, or joint owners, a court of equity ought to deem the purchase of an outstanding incumbrance or adverse title by one to be a trust for the benefit of both, if not *ex contractu*, at all events *in foro conscientiae*." * * *

"The other point, however, suggested at the argument by the plaintiff's counsel is not undeserving of notice. It is that even if no title in the premises did pass by the deed of Luther Richardson to Flagg and Mann, yet, nevertheless, there was a color of title in him at the time, and that the deed itself being accepted by Flagg and Mann, and the assignment being taken, and the notes given, under and in virtue of the parol agreement between them for the joint purchase from Richardson, these facts did of themselves create a privity of claim and right in the premises sufficient to establish a fiduciary relation between them. And if such a fiduciary relation actually did exist, then the purchase of Mann from Walker and Fisher and from the Frye heirs must be treated in equity as a purchase for the joint account of Flagg and Mann. There is great force in the argument, and I am not prepared to say that it is not well founded. In the first place, it seems to me clear that if there had been a written agreement between Flagg and Mann to make the purchase from Richardson, and the purchase had been executed accordingly, while that contract remained unrescinded it would have created a privity of contract between them which would establish a fiduciary relation for all purposes connected with the premises, whatever might be the state of the title." * * *

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“However, in the present case, I do not mean to rely upon any fiduciary relation arising from privity of contract, but upon a fiduciary relation arising from privity of title and estate between Flagg and Mann. In this view of the case the purchase made directly by Mann of Walker and Fisher, and also the purchase made through Adams, of the Frye heirs, must be deemed, so far as Mann is concerned, as made on the joint account of Flagg and Mann.”

We have felt justified in making copious extracts from this opinion, first, because the case is in many respects analogous to the one under consideration; and, second, because of the high source from which it emanated. The opinion in the case of *Van Horne v. Fonda*, *supra*, by Chancellor Kent, is quoted with approval by Justice Story, and it sustains the same principles. (See, also, *Venable v. Beauchamp*, 3 Dana, Ky. 324; *Morgan's Heirs v. Boone's Heirs*, 4 Mon., Ky. 297; *Holridge v. Gillespie*, 2 Johns. Ch. 33; *Rothwell v. Dewees*, 2 Black. U. S. 613; *Sneed's Heirs et al. v. Atherton*, 6 Dana, 278; *Tanner v. Elworthy*, 4 Beavan, 490; *Burhaus v. Van Zandt*, 7 N. Y. 523; *Rupp v. Orr*, 31 Pa. 517; *Lloyd v. Lynch*, 28 Pa. 419; *Burrill v. Bull*, 3 Sandf. Ch. 15; *Mandeville v. Solomon*, 33 Cal. 38; *In re Brown's Estate, Myers's appeal*, 2 Barr. Pa. 463; *Frentz v. Klotzsch*, 28 Wis. 317; Freeman on Co-tenancy and Partition, sec. 150, *et seq.*)

At section 163, Mr. Freeman says: “A question has been raised, whether in order to estop a party from acquiring an adverse claim, he must not be a tenant in common of some title. In some cases, where two or more have purchased from one whom they supposed to have title, and it turned out that he had none whatsoever, it has been determined that each was at liberty to obtain the whole tract from the true owner. ‘The bare fact that each had been cheated neither gave any right to the other nor deprived him of the full and absolute right to purchase from the real owner when discovered. (*Smiley v. Dixon*, 1 Penrose & Watts, 440; *Roberts v. Thorn*, 25 Tex. 734.) The cases which approve this language involved a determination of the rights of persons who had made purchases from a claimant

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believing him to have a title. The lands purchased seem to have been vacant public lands. The interest acquired under the deed was neither possession nor the right of possession. It was properly described in one of the cases as 'mere moonshine,' and in each case it was adjudged to have no force to prevent either party from obtaining title in his own name, and for his own use, from the government. These cases were probably determined correctly, but it is manifest that the principles announced in them should be confined to the identical cases. There may be no valid objection to permitting a person to acquire for his own use vacant lands owned by the state or federal government, notwithstanding he may have before been so unfortunate as to be concerned in a joint purchase from one having no title. But to say, generally, that co-grantees are not liable to the restraints imposed on co-tenants, merely because they obtained no title, would be to except out of the general rule those cases in which equitable considerations most imperatively demand its enforcement. No doubt, in these, as in all other cases, the test to be applied is to consider the actual relations of the parties, rather than their nominal relations. If, notwithstanding the fact that they are named co-grantees in the deed, they acquired nothing from their purchase, and either never exercised the rights of joint owners, or have ceased to consider themselves within the relation of co-tenancy on account of their failure of title, then both shall be free to deal with the subject-matter of their former purchase. If, on the contrary, though they have no title, the parties continue to regard each other as co-tenants, and if on that account they are apparently sustaining toward each other relations of trust and confidence, then neither should be at liberty to act in hostility to the interests of the other. If a distinction is to be taken in regard to the restraints imposed on co-tenants, based upon the difference between want of title and defective title, then the very embarrassing question must frequently exist, as to the point where a defective title becomes so defective that it may be regarded as 'mere moonshine.' Whenever an outstanding title is paramount

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to that of the co-tenants, then their title, though some may term it defective only, is in fact no title. To hold that co-tenants are bound only when they have title is, therefore, holding that they are free, except when neither can injure the other."

The cases referred to by Mr. Freeman—*Smiley v. Dixon* and *Roberts v. Thorn*—are in no respect opposed to the doctrine laid down in the text; nor are we able, after exhaustive research, to find any well considered case that does not sustain his conclusions. We therefore hold that there was such privity of title and estate between Rowland and his co-grantees in the Harvey deed, that independent of intention, an implied trust in favor of Rowland existed subsequent to the acquirement of the title from the state of California, and that parol testimony of the agreement was admissible. We are also of the opinion that the court was justified from the evidence in its conclusion, stated in the second finding of fact. The testimony of Gillson and Rowland fully sustain it and many circumstances corroborate it. We conclude then, that by reason of privity of title, as well as of agreement executed in part, there was a fiduciary relation existing between the parties sufficient to make the subsequent purchase for their joint benefit.

Having arrived at this conclusion, it is unnecessary to decide whether Davis & Gillson, at the time of the purchase of the land scrip and warrants, in fact loaned the purchase money to Rowland or not.

If we should conclude that they did make the loan, and that one-sixth part of the purchase money for the scrip was Rowland's, that fact would only bring us to the conclusion that there was a resulting trust in his favor, to which we have already arrived for other reasons; and should we conclude there was no loan, there would yet remain a resulting trust to which the same consequences must follow, regardless of the question of payment of the purchase money for the subsequently acquired title.

It is admitted that prior to the commencement of this action neither Rowland nor plaintiff tendered to appellants any portion of their expenditures in acquiring the title from

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the state of California, although respondent testified that he asked appellants for a statement of the same prior to the suit. It is a well settled principle that a trustee shall be allowed all proper expenses incurred in the discharge of his duties, and that a tenant in common who acquires an outstanding title beneficial to his co-tenant shall be fully recompensed before a court will require him to convey to his co-tenant. Whether, in all cases, it is necessary for the *cestui que trust* to tender the amount due before bringing suit for the property in specie, it is not essential in this case to decide. In an action to recover the proceeds of the sale of the trust property, under the circumstances attending this case, there is no reason for the rule invoked by counsel for appellants that the *cestui que trust* must tender his portion of the expenses before he has any standing in court, for the reason that at the time the action was commenced there was more trust money in their hands than the aggregate expenditure, both according to the findings of the court, to which no exception is taken, and according to their own statement and tender to respondent prior to the commencement of the action. The law does not require so useless a thing as the tendering of an additional sum under such circumstances.

It is next claimed by appellants' counsel that both Freeman and Paton were purchasers without notice, and that they cannot be bound by any secret trust.

As to Freeman, it is sufficient to say that at the time the title from the state of California was acquired he had no pecuniary interest in the lands; that he was made a naked trustee to hold the title for the parties beneficially interested. In other words, he was a mere volunteer. If he has any interest in the proceeds of the sale, it is by virtue of a subsequent purchase of an equitable interest in the lands, like Paton. They admit in their answer that they, with other appellants, received the money paid by the C. and T. L. and F. Co., and it can be followed into their hands by respondent, notwithstanding they had no actual notice at the time. The defense of purchase for value without notice does not apply to them.

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When Freeman bought in with Davis and Paton into the firm of Spooner & Lockie, and Spooner, Lockie & Co., the legal title to these lands was in Freeman, and the above-named firms and the members thereof owned only an equitable interest in them. Freeman and Paton, therefore, purchased only an equity in the lands. At that time Rowland also had an equity in them.

“As between persons claiming merely equitable interests, the defense of purchase for value without notice has no place. A party who purchases an equity takes it subject to all the equities which affect it in the hands of the assignor. The first grantee of an equity has the right to be paid first, and it is quite immaterial whether the subsequent incumbrancers had, at the time they took their securities and paid their money, notice of a prior incumbrance.” (Kerr on Fraud and Mistake, 321.)

Before one can take an estate discharged of a prior equity, it must appear that he acquired the legal title and actually paid the purchase money or parted with something of value by way of payment before receiving notice.

At the trial, counsel for appellants asked witness Rowland if he remembered any conversation between himself and Gillson, in which the payment by Rowland of his part of the purchase money was mentioned.

The court ordered the witness to answer yes or no. The answer was : “I don’t think there was any on that day.”

The answer was stricken out because it was not responsive to the question.

The same question was asked again, and the witness answered, “I don’t know.”

The answer was stricken out for the same reason.

The question, in substance, was again asked and answered as at first, and the answer was stricken out.

Appellants urge that the striking out of these answers was error. Appellants, undoubtedly, had the right to have the question answered as the court ordered ; but respondent’s privilege was to have the answer responsive to the question and in accordance with the court’s order. As given it was neither. Counsel for appellants might have insisted upon an answer “yes or no,” but he did not do so. No objection

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was taken to the order of the court instructing the witness how to answer, and while the order was in force, no other answer was permissible. When another answer was given, the court, without motion of counsel, could have ordered it stricken out.

Witness Bliss, who purchased the lands in question for the C. and T. L. and F. Co., after testifying that before purchase, but with a view of determining its value, in company with Davis, Spooner, Rowland and another man, he went over the land, was asked if Rowland knew at the time that he was looking at the land with a view of purchasing it from Davis, Freeman, Spooner and Patton, and the answer was that he did.

He was then asked by counsel for appellants if Rowland, then or at any time before the sale, made known to witness the fact that he had or claimed any interest whatever in the land. Objection was taken to the question. The court held that appellants must first show that Rowland knew that witness was there for the purpose of purchasing the whole tract. Nothing further was shown, and the objection was sustained. This is claimed as error. The question was in no sense proper. Rowland was under no obligation, in law or morals, to inform Mr. Bliss that he claimed an interest in the lands, since he did not, and does not, object to the sale. Had he made known his claim, proof of that fact would have established no rights in his favor; and the fact that he did not volunteer a statement of his claim certainly could not defeat it. Some men might have told Bliss that they owned an interest if such was the fact, but many others would not. It does not appear that at that time appellants had denied his claim in the lands, and if they had not it would have been a strange proceeding on Rowland's part to volunteer the information that he had or claimed an interest.

It is next urged that the court erred in refusing to allow appellants to prove by witnesses Spooner and Shauklin that a less number of acres were patented of the Harvey tract than is alleged in the complaint. Such proofs would certainly have been immaterial, because it is admitted in the pleadings that all the lands included in the Harvey tract were sold to the C. and T. L. and F. Co., whether patented

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or not. If they were patented, Freeman held them in trust for Rowland as well as his associates; and if any were not patented Rowland was interested in such to the extent of one-sixth part under the Harvey deed. It being true, then, that both the patented and the unpatented lands were sold for eight dollars and sixty cents per acre, it was immaterial, for the purposes of this case upon this question, how many acres of the Harvey tract were patented. Finally, counsel for appellants urge that the findings numbers two, four, five, six, eight, twelve, thirteen, fourteen, fifteen and twenty are not supported by the evidence. We have already passed upon the second finding. Of the fourth, objection is taken to the last sentence only. As to that, there is much to sustain it.

The testimony is conflicting, and therefore, under well known principles, we cannot disturb it. Besides, if it is incorrect, it is error without injury to appellants, for the reasons before stated; and the same is true as to number six.

As to the fifth and eighth, the evidence is also conflicting. We cannot disturb them.

Objection is taken to the twelfth and thirteenth, so far as it is found that the parties therein named had notice. We have seen that Paton and Freeman required no notice, and the balance certainly had notice of all the facts that are important in this case. What has been said of number two is equally applicable to number fourteen. Number fifteen is supported by the evidence and pleadings. Number twenty is objected to so far as a tender is found. Whether a technical tender by appellants to respondent was or was not made, is not a question for our decision. It is undisputed that appellants, before this action was commenced in Carson, offered then and there to pay respondent certain moneys in satisfaction of his claim, and upon his refusal to accept the money in satisfaction, informed him that the sum offered would be placed in bank subject to his acceptance. The court used the word "tendered" in its popular sense only.

The order and judgment appealed from are affirmed.

RESPONSE TO PETITION FOR REHEARING.

By the Court, LEONARD, J. We concede the correctness

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of the doctrine announced in *Mandeville v. Solomon* (39 Cal. 133), and the cases therein cited, that where one tenant in common purchases an outstanding title for the benefit of his co-tenants, the latter must, within a reasonable time, contribute or offer to contribute their proportion of the purchase money. But that principle applies to cases only where the purchasing co-tenant wishes to be paid, and conducts himself accordingly. If he does not desire to be paid by his co-tenants, or conveys to them the idea that they need not pay until convenient, the principle does not apply. Gillson testified that the other co-tenants did not want Rowland to pay; that Davis, Gillson, Spooner and Lockie thought they would sometime find Rowland in a close place, when he would be anxious to sell out. Rowland told Gillson he had a lot of timber he was going to sell, and that in the meantime he would pay interest. Gillson testified that he "eased Rowland off like;" that he and Lockie had been talking about getting Rowland's interest; that Davis, Gillson, Spooner and Lockie wanted Rowland's interest, because they owned other lands in Lake valley, and thought if Rowland kept his interest, their matters would be complicated. Rowland's testimony corroborated Gillson's to the effect that it was understood that it was all right if Rowland did not pay up until it was convenient for him to do so.

There is no testimony that appellants ever asked Rowland or respondent to pay any part of the expenses. Appellants could not convey the idea to Rowland that he need not pay until it was convenient, and then allege non-payment within a reasonable time as a reason why he should not recover.

We said in our opinion : "It is next urged that the court erred in refusing to allow appellants to prove by witnesses Spooner and Shanklin that a less number of acres were patented of the Harvey tract than is alleged in the complaint." There was a verbal inaccuracy in our statement. We should have said : "It is urged that the court erred in refusing to allow appellants to prove that the title from the State of California had not been obtained for a portion of the Harvey tract." We said it was immaterial. An offer to prove that a portion of the lands described in the complaint

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were not included in the Harvey tract would have been material, but that was not the offer.

It is stated in the complaint that in pursuance of the alleged agreement, Rowland, Gillson, Davis, Spooner and Lockie purchased the possessory right in and to the lands described in the complaint, and there is no denial of this allegation. It is admitted by all the witnesses, that said parties did agree to purchase, and did purchase, Harvey's possessory title, and it is not claimed that there was an agreement to purchase the possessory title to any other lands. It follows, then, that all the lands described in the complaint were included in the Harvey tract, and that was the vital question in this connection ; although we did not doubt, from the pleadings, the proof and the findings of the court, to which no exceptions were taken, that it was conceded on all sides that the Harvey tract and the lands described in the complaint were the same ; that is to say, that the lands described included the whole Harvey tract. But passing the question of admission in the pleadings, it is sufficient upon this application to refer to the second and third findings of fact by the court.

There it is found that "on the twentieth of August, 1872, defendants Davis and Spooner, together with one Thomas Rowland, and John A. Lockie and George Gillson, agreed verbally together to purchase and acquire from one C. W. Harvey the possessory title to and the possession of the lands described in the complaint, and that afterward, in pursuance of said agreement, and for the purpose of acquiring the possession of and title to said lands, said Davis, Spooner, Lockie, Gillson and Rowland took and received a grant, bargain and sale deed of conveyance from said Harvey of said lands, and received possession of the same from said Harvey." No objection was made or exception taken to these findings. Hence it follows as a fact that all the lands described in the complaint were included in the Harvey tract, from which fact the conclusions arrived at in the opinion follow for the reasons there stated.

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CONTEMPT, WHEN APPEAL LIES. (See Contempt, 5.) 322.

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WHEN OBJECTIONS MUST BE MADE. (See Objections, 1.) 446.

ASSESSMENT.

COMPLAINT AGAINST ASSESSMENT FOR TAXES. (See Taxes, 1.) 89.

ASSESSOR.

1. EVIDENCE OF VALUATION—ASSESSOR'S STATEMENT.—Statements made by the assessor in regard to the valuation of property before the board of equalization, in his official capacity and under the sanction of his official oath, is intended by the law to have the force of testimony, and such a statement is competent evidence upon which the board is authorized to act in raising the assessment. *State v. Northern Belle M. & M. Co.*, 89.

ASSIGNMENT.

ASSIGNMENT OF ERRORS IN STATEMENT ON MOTION FOR NEW TRIAL—INSUFFICIENCY OF EVIDENCE. (See Statement, 1.) 78.

ASSIGNMENT OF DEBTOR'S ESTATE. (See Agreement, 1.) 355.

ATTACHMENT.

LIABILITY OF SURETIES ON AN UNDERTAKING ON RELEASE OF ATTACHMENT. (See Pleadings, 5.) 234.

BILL OF EXCEPTIONS.

1. CHARGE OF THE COURT MUST BE EMBODIED IN A BILL OF EXCEPTIONS.—The charge given by the court of its own motion is not a part of the record, unless it is included in the bill of exceptions. *State v. Ah Mook*, 369.
2. DUTY OF CLERK—BILL OF EXCEPTIONS.—It is the duty of the clerk to attach the bill of exceptions to the rest of the judgment-roll before it is filed, just as it was left by the judge who signed it. He must not add to it, or subtract from it, anything whatever. *Id.*

ERRORS IN CRIMINAL CASES MUST BE SET FORTH IN BILL OF EXCEPTIONS. (See Criminal Law, 2.) 121.

EVIDENCE IN CRIMINAL CASE, WHEN PART OF THE RECORD ON APPEAL. (See Criminal Law, 11, 12.) 403.

BILLS AND NOTES.

PROMISSORY NOTES EXECUTED TO HINDER AND DELAY CREDITORS. (See Statute of Frauds, 1.) 195.

PAYMENTS ON NOTES, HOW CREDITED. (See Payments, 1.) 195.

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BOARD OF EQUALIZATION.

- COMPLAINT AGAINST ASSESSMENT FOR TAXES. (See Taxes, 1.) 89.
- BOARD MUST GIVE NOTICE BEFORE TAXES ARE RAISED. (See Taxes, 2.) 89.
- ASSESSOR'S STATEMENT, WHEN TO BE TAKEN AS EVIDENCE OF VALUATION. (See Assessor, 1.) 89.

BOOKS OF ACCOUNT.

- REFRESHING MEMORY OF WITNESS. (See Evidence, 1.) 196.
- WHEN ADMISSIBLE IN EVIDENCE. (See Evidence, 8, 9.) 423.

BURGLARY.

1. BURGLARY—INTENT.—In order to constitute the crime of burglary, it is just as essential to prove the intent as it is to prove the entry. *State v. Cowell*, 337.
 2. BURGLARY—INSUFFICIENCY OF EVIDENCE.—Testimony that defendants broke into a tool-house of the railroad company, took therefrom a hand-car, placed it on the track, propelled it themselves a distance of twelve miles, removed the hand-car from the rails to the side of the track, and there left it: *Held*, insufficient to show that the breaking into the tool-house was with the intent to commit larceny. *State v. Ryan*, 401.
 3. IDEM—INTENT NECESSARY TO CONSTITUTE LARCENY.—There may be a larceny without any intent on the part of the thief to profit himself, but there cannot be a larceny without an intent to deprive the owner of his property.
- RELEVANCY OF TESTIMONY—PREVIOUS AGREEMENT TO COMMIT ROBBERY. (See Criminal Law, 7, 8.) 337.

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- Barnes v. Sabron*, 10 Nev. 240, in *Courtney v. Turner*, 354.
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- Caples v. Central Pacific R. R. Co.*, 6 Nev. 274, in *Allison v. Hagan*, 60.
- Cardinal v. Edwards*, 5 Nev. 36, in *Estey v. Cooke*, 280.
- Carnaghan v. Ward*, 8 Nev. 33, in *State v. Harris*, 422.
- Clarke v. Strouse*, 11 Nev. 79, in *Daniels v. Daniels*, 121.
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- State v. Ah Mook, 12 Nev. 373, in State v. Mills, 405.
- State v. Cohn, 9 Nev. 179, in State v. Harrington, 130.
- State v. Commissioners of Washoe County, 5 Nev. 317, in State ex rel. Twaddle v. Commissioners of Washoe County, 19; Johnson v. Eureka County, 31; Phillips v. Welch, 169, 183, and In re Wixom, 222.
- State v. Forsha, 8 Nev. 139, in State v. Ah Mook, 373.
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- State v. Stewart, 9 Nev. 131, in State v. Harrington, 133, 134, 139.
- State ex rel. Fall v. Commissioners of Humboldt County, 6 Nev. 100, in Phillips v. Welch, 169, and In re Wixom, 222.
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 Dayton G. & S. M. Co. v. Seawell, 11 Nev. 394, in *Thorn v. Sweeney*, 255.
 Lambert v. McFarland, 2 Nev. 112, in *Buckley v. Buckley*, 429.
 Phillips v. Welch, 11 Nev. 187, in *Phillips v. Welch*, 164.
 Scorpion Company v. Marsano, 10 Nev. 379, in *Golden Fleece G. & S. M. Co. v. Cable Consolidated G. & S. M. Co.*, 320.
 State v. Johnson, 11 Nev. 148, in *State v. Johnson*, 124.
 State v. McClean, 11 Nev. 39, in *State v. Johnson*, 122.
 Treadway v. Wilder, 8 Nev. 95, *Id.* 9 Nev. 69, in *Treadway v. Wilder*, 110.

CERTIORARI.

1. INQUIRY UPON CERTIORARI.—The inquiry upon the writ of certiorari cannot be extended any further than is necessary to determine whether the inferior tribunal has exceeded its jurisdiction, or has regularly pursued its authority. *Phillips v. Welch*, 158.
2. IDEM—EXCESS OF JURISDICTION. — Error in judgment, in respect to a question which the court is authorized to investigate and determine, does not constitute an excess of jurisdiction. *Id.*
3. IDEM—AUTHORITY OF SUPREME COURT. — Whenever the inferior tribunal has regularly pursued its authority, and has not, in any respect, exceeded its jurisdiction, the authority of the supreme court in this proceeding ceases; it cannot correct any errors of law or fact not jurisdictional in their character. *Id.* 159.
4. CERTIORARI—STATUTES CONSTRUED.—In construing sections 1497 and 1503, vol. 1, compiled laws: *Held*, that the words “has exceeded the jurisdiction of such tribunal,” and “regularly pursued the authority of such tribunal,” present substantially the same idea, and under neither section can any question be inquired into or decided, except that of jurisdiction. *Id.*
5. NO EXCESS OF JURISDICTION.—The facts of this case elaborately reviewed: *Held*, that the court, in adjudging petitioner guilty of a contempt, in violating the decree and order in the suit of *Phillips v. Welch*, did not exceed its jurisdiction, and that this court cannot, upon the writ of certiorari, review the case upon the merits. (BEATTY, J., dissenting.) *Id.*
6. CERTIORARI—EXPIRATION OF TIME FOR APPEAL.—Petitioner having been convicted of a felony, and the time for appeal having expired, claims that his right to appeal was lost by means of the arbitrary conduct of the district court in forcing him to go to trial without the assistance of counsel, and asks that a writ of certiorari be issued to review the proceedings had in the district court: *Held*, that the case cannot be reviewed upon its merits as the court had jurisdiction of the case and of the person of petitioner. *In re Wixom*, 219.
7. IDEM.—The review upon certiorari extends only to the questions whether the inferior tribunal has kept within its jurisdiction. *Id.*

JUDGMENT OF DISTRICT COURT, WHEN NOT A BAR. (See Judgment, 2.) 17.

CERTIFICATE OF PURCHASE.

WHEN STATUTE OF LIMITATIONS COMMENCES TO RUN. (See Limitations, 3.) 108.

COMPILED LAWS.

See STATUTES, "COMPILED LAWS CITED."

CONSTITUTION.

1. DRUMMER ACT CONSTITUTIONAL.—In construing the act of February 20, 1877 (Statutes 1877-79), commonly known as the drummer act: *Held*, that the act is a revenue law, imposing a tax upon drummers and traveling merchants who go from place to place soliciting orders for goods, wares and merchandise; that it does not impose any impost or duty upon imports, and does not interfere with the power of congress to regulate commerce among the states, and is not repugnant to any provision of the state or federal constitution. *Ex parte Robinson*, 263.
2. SECTION 1, ARTICLE 10, OF THE CONSTITUTION CONSTRUED.—In construing section 1 of article 10 of the state constitution: *Held*, that it refers particularly to the levy of *ad valorem* taxes on all property, real and personal, and does not apply to licenses imposed for conducting any business or profession. *Id.*

PROVISIONS CITED: Art. 6, secs. 6-8. Equitable defenses cannot be plead in justices court, 96, art. 10, sec. 1. Uniform rate of taxation, 268-269.

POWER OF STATE TAXATION. (See Taxes, 3.) 263.

REPEALING CLAUSE IN UNCONSTITUTIONAL STATUTE. (See Jury, 4.) 300.

CONSTRUCTION.

INSTRUCTIONS MUST BE CONSTRUED AS A WHOLE. (See Instructions, 2.) 39.

TOWN SITE ACT CONSTRUED. (See Town Site, 1 to 5.) 65.

SECTIONS 1497 AND 1513, COMPILED LAWS, CONSTRUED. (See Certiorari, 4.) 159.

DRUMMER ACT HELD CONSTITUTIONAL. (See Constitution, 1.) 263.

SECTION 1, ARTICLE 10, OF THE CONSTITUTION CONSTRUED. (See Constitution, 2.) 263.

CONTEMPT.

1. CONTEMPT—SUFFICIENCY OF AFFIDAVIT.—The affidavit alleging that Sweeney had violated the decree in the case of *Phillips v. Welch*, reviewed and held sufficient to give the court jurisdiction of the subject-matter of the contempt, and of the person of the petitioner. *Phillips v. Welch*, 158.
2. CONTEMPT—HABEAS CORPUS—JURISDICTION.—When a court commits a party for a contempt, its adjudication is a conviction, and its commitment, in consequence, is execution; and no court can discharge on habeas corpus a person that is in execution by the judgment of any other court having jurisdiction of the subject-matter of the contempt. *Id.* 159.

3. JURISDICTION—CONTEMPT.—Jurisdiction as applied to any particular claim or controversy is the power to hear and determine that controversy, and where a person is charged with violating the decree of a court, no other court except the one rendering the decree can hear or determine the controversy, or punish such person if found guilty of a contempt. *Id.*
4. CONTEMPT—JUDGMENT OF CONVICTION FINAL AND CONCLUSIVE.—A contempt of the character alleged in this proceeding is a specific substantive and distinct criminal offense, and under the constitution and laws of this state, judgment of conviction, if within the jurisdiction of the inferior court, is final and conclusive. *Id.*
5. CONTEMPT—WHEN APPEAL LIES.—An order adjudging garnishees to be in contempt of court for failing to pay over money is in the nature of a civil process, and is, under the principles decided in *Phillips v. Welch* (11 Nev. 190), an appealable order. *Hagerman v. Tong Lee*, 332.

CONTRACTS.

1. ILLEGAL CONTRACTS.—Courts will not aid either party in enforcing an illegal *executory* contract; nor if executed will they aid either party in setting it aside, or in recovering back what has been passed under it. Whenever an executory contract is tainted with fraud, the courts refuse to enforce it, and it makes no difference whether the fraud is shown by the plaintiff or defendant. *McCausland v. Ralston*, 195.

ACTIONS UPON CONTRACTS—COUNTER CLAIMS. (See Counter Claim, 1.) 225.

CONVEYANCE.

See FRAUDULENT CONVEYANCE.

EFFECT OF CONVEYANCES TO DEFRAUD CREDITORS. (See Instructions, 3.) 39.

CORPORATIONS.

ISSUANCE OF MINING STOCK. (See Mandamus, 3.) 105.

COSTS.

TENDER—COSTS.—After the commencement of the trial, the defendant tendered to plaintiff an amount of money largely in excess of the amount recovered by him: *Held*, that defendant is entitled to recover all costs that accrued after the tender was made, and all other costs relating specially to the fraudulent note. *McCausland v. Ralston*, 196.

DISSOLUTION OF COPARTNERSHIP—COSTS, HOW TAXED. (See Partnership, 4.) 31.

COUNSEL.

WHEN IT IS THE DUTY OF COUNSEL TO PREPARE INSTRUCTIONS. (See Instructions, 5.) 39.

RIGHT OF COUNSEL TO COMMENT ON TESTIMONY OF DEFENDANT IN CRIMINAL CASE. (See Criminal Law, 3.) 125.

COUNTER-CLAIM.

1. COUNTER-CLAIMS—ACTIONS UPON CONTRACTS.—In an action arising upon contract, any other cause of action arising also upon contract, and ex-

isting at the time of the commencement of the action is a good counter-claim. *Foulks v. Rhodes*, 225.

COPARTNERSHIP ACCOUNTS—PLEADINGS. (See Pleadings, 2, 3.) 225.

COUNTY CLERK.

DUTY OF CLERK IN PREPARING RECORD IN CRIMINAL CASE. (See Criminal Law, 10.) 369.

COUNTY COMMISSIONERS.

1. **ROADS AND HIGHWAYS—JURISDICTION OF COUNTY COMMISSIONERS.**—Where the board of county commissioners closed a public road upon a petition signed by only fourteen persons, the petition being silent as to the number of legal voters in the county, and the statute requiring the signature of twenty-four freeholders in counties containing one hundred or more legal voters: *Held*, that the action of the board was in excess of its powers, and completely null and void. *State ex rel. Twaddle v. Commissioners of Washoe County*, 17.
2. **JURISDICTION OF COMMISSIONER MUST BE AFFIRMATIVELY SHOWN.**—Whenever the jurisdiction of the board of county commissioners depends upon certain facts to be ascertained and determined by it, its record should show that it acted upon the evidence presented and adjudged the facts to be sufficient. *Johnson v. Eureka County*, 28.

See BOARD OF EQUALIZATION.

COUNTY RECORDER.

COUNTY RECORDERS ARE AUTHORIZED TO ADMINISTER OATHS TO MECHANIC'S LIEN. (See Mechanic's Lien.) 99.

CREDITORS.

WHEN CREDITORS CAN DEFEAT A FRAUDULENT CONVEYANCE. (See Fraudulent Conveyance, 2.) 38.

AGREEMENT TO EXTEND TIME FOR PAYMENT OF NOTES. (See Agreement, 1.) 355.

CRIMINAL LAW.

1. **WHEN JUDGMENT SHOULD BE AFFIRMED IN A CRIMINAL CASE.**—When the defendant in a criminal case fails to put in an appearance in the appellate court, the judgment of conviction will be affirmed upon motion. 1 Comp. L. 2109; *State v. Chin Wah*, 118.
2. **CRIMINAL LAW—ERRORS MUST BE SET FORTH IN BILL OF EXCEPTIONS.**—Facts tending to show that the court erred in the admission of testimony upon the trial of a criminal case must be included in a bill of exceptions, otherwise they cannot be considered on appeal. *State v. Johnson*, 121.
3. **TESTIMONY OF DEFENDANT—COMMENTS OF COUNSEL.**—If the defendant in a criminal case voluntarily testifies in his own behalf, the same rights exist in favor of the district attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inference from his failure to testify upon any material matter within his knowledge, as with other witnesses. *State v. Harrington*, 125.

4. **OPINIONS OF WITNESSES, WHEN NOT ADMISSIBLE.**—A witness for defendant having testified that, just preceding the shooting deceased had hold of the defendant; that defendant was trying to free himself, and having described the action of the parties, was asked: "What did he (deceased) appear to be doing with his hand or arm?" the court refused to allow the question: *Held*, not to be erroneous, inasmuch as the witness had already stated all he saw or knew, and that the question called for an opinion, not the statement of any fact. *Id.*
5. **TESTIMONY OF DEFENDANT'S BELIEF AT TIME OF HOMICIDE ADMISSIBLE.**—A defendant charged with murder is entitled, in giving his testimony, to state to the jury whether at the moment of the discharge of his pistol at the deceased, he did, or did not, really believe that he was in danger of losing his life, or of receiving great bodily harm, for the purpose of showing the condition of his mind at the time, and for the purpose of establishing one of the necessary conditions of justification. It being left to the jury to weigh and consider the question whether such testimony is true or false. *Id.*
6. **INSUFFICIENCY OF EVIDENCE.**—A verdict in a criminal case will not be reversed where there is any evidence to support it. *State v. Crozier*, 300.
7. **BURGLARY—RELEVANCY OF TESTIMONY.**—To make testimony relevant it is not necessary that it should be essential; although cumulative and superogatory it may be received. *State v. Cowell*, 337.
8. **IDEM—PREVIOUS AGREEMENT TO COMMIT ROBBERY.**—Defendants were jointly indicted for the crime of burglary in entering the dwelling-house of one Alderson with intent to steal. Upon the trial one of the defendants, on behalf of the state, was allowed to testify that a few days before the commission of the burglary, he and the other defendants agreed to commit a robbery on the person of said Alderson; that they did not rob him because the witness said he had nothing to be robbed of; that the other defendants were watching Alderson on the street for that purpose: *Held*, admissible and relevant, as it tended to prove the intent of defendants at the time of the entry into the dwelling-house. *Id.*
9. **CRIMINAL LAW—TRANSCRIPT ON APPEAL.**—The supreme court, in the examination of the transcript on appeal in a criminal case, cannot look at anything contained therein that is outside of the record provided for by statute. *State v. Ah Mook*, 369.
10. **DUTY OF CLERK IN PREPARING RECORD.**—The papers that constitute the record or judgment roll in a criminal case, are specified in volume 1, compiled laws, 2075, and it is the duty of the clerk to fasten them together and file them within five days after the entry of a judgment of conviction. *Id.*
11. **EVIDENCE IN CRIMINAL CASE, WHEN PART OF THE RECORD ON APPEAL.**—The only method of making the evidence in a criminal case a part of the record on appeal is to embody it in a bill of exceptions. *State v. Mills*, 403.
12. **IDEM—BILL OF EXCEPTIONS.**—The bill of exceptions, properly settled and signed by the judge, together with the rest of the record as provided for in section 450 of the criminal practice act, is all that the supreme court will notice in the examination of a criminal case on appeal. *Id.*
13. **IDEM—JURISDICTION LIMITED TO QUESTIONS OF LAW.**—The jurisdiction of the supreme court in a criminal case is limited to questions of law

alone. No judgment of conviction will ever be reversed upon the ground that the verdict is contrary to the evidence, if there is any evidence to support it. *Id.*

14. SEPARATION OF JURY—DUTY OF OFFICER.—An officer in charge of a jury in a criminal case ought not to permit strangers to have access to a juror out of his sight and hearing, and thus afford an opportunity, however slight, for tampering with, or prejudicing the juror. *State v. Harris*, 414.

TESTIMONY OF DECEASED WITNESS, WHEN ADMISSIBLE. (See Evidence, 4.) 121.

UNCONSTITUTIONAL JURY LAW. (See Evidence, 5.) 121.

HOSTILE DEMONSTRATIONS AND OVERT ACTS. (See Instructions, 7, 8, 9.) 125.

INSTRUCTIONS ASSUMING FACTS WITHOUT ALLUDING TO THE EVIDENCE. (See Instructions, 10.) 125.

SUFFICIENCY OF INDICTMENT FOR MURDER IN THE FIRST DEGREE. (See Indictment, 1.) 140.

INSANITY AND INTOXICATION. (See Insanity, 1.) 140.

HOMICIDE NOT JUSTIFIED BY PROVOCATION. (See Homicide, 1.) 300.

INTENT TO COMMIT BURGLARY. (See Burglary, 1.) 337.

CHARGE OF THE COURT MUST BE EMBODIED IN A BILL OF EXCEPTIONS. (See Bill of Exceptions, 1.) 369.

DUTY OF CLERK IN PREPARING RECORD. (See Bill of Exceptions, 2.) 369.

INSTRUCTIONS RELATING TO MURDER. (See Homicide, 3, 4, 5.) 369.

INSTRUCTIONS UPON THE SAME POINT HOW CONSIDERED. (See Instructions, 11.) 369.

INSUFFICIENCY OF EVIDENCE TO CONSTITUTE THE CRIME OF BURGLARY. (See Burglary, 2, 3.) 401.

INTENT NECESSARY TO CONSTITUTE LARCENY. (See Burglary, 3.) 401.

FORM OF INDICTMENT IN CHARGING MURDER. (See Indictment, 2, 3.) 414.

OBJECTIONS TO INDICTMENT WHEN NO GROUND OF DEMURRER. (See Indictment, 4, 5.) 414.

SEPARATION OF JURY. (See Jury, 5.) 414.

WHEN NEW TRIAL WILL NOT BE GRANTED ON ACCOUNT OF SEPARATION OF JURY. (See New Trial, 2.) 414.

INSTRUCTIONS RELATING TO MURDER. (See Homicide, 6.) 414.

CROSS-EXAMINATION.

See WITNESS.

CRIMINAL PRACTICE ACT.

Sections 226-9. Indorsement on Indictment, 419.

Sections 234-5, 243-4. Sufficiency of Indictment, 418.

Sections 275-286. When objections must be made to Indictment, 419-20.

Section 335. Not repealed.

Sections 424-450. Bill of Exceptions, 405.

See STATUTES, "COMPILED LAWS CITED."

CRIMES AND PUNISHMENT ACT.

Sections 25-6. Justifiable Homicide, 136.

DAMAGES.

1. **DAMAGES—WHEN EVIDENCE OF ADMISSIBLE.**—Damages which necessarily result from a wrongful act, may be shown and recovered under the general allegation of damages; but damages which are the natural but not the necessary consequences of the act complained of must be particularly specified, or evidence of them will not be permitted at the trial. *Buckley v. Buckley*, 423.
2. **MEASURE OF DAMAGES IN REPLEVIN.**—The facts of this case and the proper measure of ascertaining and computing damages discussed at length in the opinion. *Id.*

DEED.

1. **LEGAL TITLE—DEED OF LAND TO T. B. & BRO.**—A conveyance of land to Thomas Barnett & Bro. vests the legal title in Thomas Barnett alone, and a conveyance from him will give to his grantees a good and valid title. *Barnett v. Lachman*, 361.

DEFAULT.

JURISDICTION OF COURT AFTER EXPIRATION OF TERM TO SET ASIDE DEFAULT. (See Jurisdiction, 1.) 118.

DEMURRER.

COUNTER-CLAIMS OF COPARTNERSHIP ACCOUNTS, WHEN ALLOWED. (See Pleadings, 2, 3.) 225.

OBJECTIONS TO INDICTMENT, WHEN NO GROUND OF DEMURRER. (See Indictment, 4, 5.) 414.

DISCRETION.

ALLOWANCE OF COSTS. (See Partnership, 4.) 31.

QUESTIONS ASKED WITNESS TO REFRESH HIS MEMORY. (See Evidence, 1.) 83.

AMENDMENT OF PLEADINGS WHEN WITHIN THE DISCRETION OF THE COURT. (See Pleadings, 1.) 195.

DISTRICT ATTORNEY.

1. **DISTRICT ATTORNEY AUTHORIZED TO APPOINT DEPUTY.**—The district attorneys of the several counties in this state have authority to appoint deputies. *State v. Harris*, 414.

DRUMMER ACT.

HELD CONSTITUTIONAL. (See Constitution, 1.) 263.

DRUNKENNESS.

INSANITY AND INTOXICATION. (See Insanity, 1.) 140.

EASEMENT.

1. **EASEMENT IN LAND.**—An easement in land can only be acquired by the consent or acquiescence of the owner. *Thorn v. Sweeney*, 251.

EJECTMENT.

1. EJECTMENT.—If a party is in possession of land under a parol contract that is not valid, either in law or equity, or if a party, after being admitted into possession under a valid contract to purchase, refuses to comply with his agreement, he is a mere trespasser, and liable to be removed by ejectment, at the will of the owner of the legal title. *Evans v. Lee*, 393.

EMINENT DOMAIN.

1. RIGHT OF EMINENT DOMAIN—PUBLIC USE.—It is within the power of the legislature to pass an act for the condemnation of land for the purpose of bringing water into cities and towns. Such a taking would be for a *public use* within the meaning of that term as used in the constitution. *Thorn v. Sweeney*, 251.

EQUITY.

1. EQUITY, WHEN NOT THE PROPER REMEDY.—A suit in equity to enjoin the assignment of an undertaking on attachment, or the commencement of an action thereon, upon the ground that said undertaking is void *ab initio*, will not be maintained, as the parties, in the event of a suit upon the undertaking, would have a complete remedy at law. *Elder v. Shaw*, 78.
2. JUSTICES' COURTS HAVE NO JURISDICTION OF EQUITABLE DEFENSES.—Under the constitution and statutes of this state, an equitable defense to an action cannot be plead in a justice's court. *Duffy v. Moran*, 94.
3. EQUITABLE ISSUES, HOW TRIED.—Where there are legal and equitable issues raised by the pleadings, the equitable issues can be tried with or without the aid of a jury. *Treadway v. Wilder*, 108.

EQUITY CASE BEFORE A JURY—WHEN MOTION FOR A NEW TRIAL MUST BE MADE. (See New Trial, 1.) 94.

INSOLVENCY OF PLAINTIFF—WHEN SUFFICIENT TO INVOKE THE EQUITABLE POWER OF THE COURT. (See Pleadings, 3.) 225.

PAROL LICENSE. (See Statute of Frauds, 2.) 280.

REAL ESTATE—WHEN PARTNERSHIP PROPERTY. (See Partnership, 8, 9.) 286.

PURCHASER OF EQUITABLE INTEREST IN LANDS NOT ENTITLED TO NOTICE. (See Trusts, 9.) 446.

ERROR.

ERROR MUST BE AFFIRMATIVELY SHOWN.—If appellant presents no argument or authorities in support of an alleged error in the court below, this court will not consider the assignment, unless the error is so unmistakable that it reveals itself by a casual inspection of the record. *Allison v. Hagan*, 38.

ASSIGNMENT OF ERRORS UPON THE GROUND OF INSUFFICIENCY OF EVIDENCE. (See Statement, 1.) 78.

ANSWER OF WITNESS—WHEN PREJUDICIAL. (See Evidence, 2.) 83.

ERRORS IN CRIMINAL CASES MUST BE SET FORTH IN BILL OF EXCEPTIONS. (See Criminal Law, 2.) 121.

EVIDENCE.

1. **QUESTIONS ASKED WITNESS TO REFRESH HIS MEMORY — DISCRETION OF COURT.**—In a suit upon a lost note, after defendant had introduced evidence to show that plaintiff in making inquiries of his friends for the lost papers never mentioned the note, plaintiff's counsel in rebuttal was allowed to ask this question: "In order to call your attention to the fact whether or not he (plaintiff) mentioned the loss of the note, I now ask you what reply you made to him?" *Held*, that the court did not abuse its discretion in allowing the question for the purpose offered. *Thunder v. Brown*, 83.
2. **IDEM—ANSWER OF WITNESS—WHEN PREJUDICIAL.**—The witness answered: "I remember what I said: If you have lost those papers Brown will never pay you:" *Held*, inadmissible as evidence, for the reason that it was a direct attack upon the character of the defendant, when his character for honesty had not been put in issue. *Id.*
3. **IDEM—When an answer is given prejudicial to a party that is not responsive to the question asked, he must move the court to strike it out, or he cannot in the appellate court complain of the answer given by the witness.** *Id.*
4. **DECEASED WITNESS—TESTIMONY OF, WHEN ADMISSIBLE.**—The testimony of a deceased witness given under oath in a proceeding authorized by law, where the opposing party had the opportunity of a cross-examination is admissible as evidence against such party in any subsequent trial of the case. *State v. Johnson*, 121.
5. **IDEM—UNCONSTITUTIONAL JURY LAW.**—The court in impaneling a jury upon the former trial of defendant, when the deceased witness testified, conducted the proceedings under the provisions of the jury law of 1875, which has since been declared unconstitutional: *Held*, that the fact that the court erred in impaneling a jury was not sufficient ground to justify the exclusion of the testimony of the witness. *Id.*
6. **REFRESHING MEMORY OF A WITNESS.**—Where a witness testifies that he has no way of fixing dates except by referring to a book of original entries made by himself, and further testifies that the entries were made at the time of the occurrence, and that the dates were correct: *Held*, that he should be allowed to examine the book for the purpose of refreshing his memory, and should be allowed to testify to the dates. Such testimony is not hearsay. *McCausland v. Ralston*, 196.
7. **PAROL EVIDENCE, WHEN ADMISSIBLE.**—Parol evidence is admissible to show an agreement between the parties that the note executed by defendant to plaintiff might, upon the consideration of the formation of a copartnership, be paid by crediting defendant with the amount of the note in the partnership accounts. This would not be a variation of the written agreement, but a satisfaction of it. *Foulks v. Rhodes*, 225.
8. **BOOKS OF ACCOUNT, WHEN ADMISSIBLE IN EVIDENCE.**—An account book kept by deceased, and shown to be principally in his handwriting, the entries being made at or about the time the transactions to which they referred occurred, and being the book by which the deceased settled with persons with whom he had business: *Held*, admissible in evidence. *Buckley v. Buckley*, 423.
9. **IDEM.**—If any particular entry in a book is inadmissible in evidence, the

party opposing its introduction must make a specific objection thereto, or move to strike it out before he can complain of the action of the court in admitting the book as evidence. *Id.*

10. CLOSE OF PLAINTIFF'S CASE—EXAMINATION OF OTHER WITNESSES.—Plaintiff having closed his case, and defendant's counsel having been ordered by the court to proceed with the examination of their witnesses, with the understanding that plaintiff should only have the privilege of calling one absent witness whenever he appeared: *Held*, that the court did not err in refusing to allow plaintiff thereafter to call and examine other witnesses generally in the case. *Id.*

11. CONFLICT OF EVIDENCE—NEW TRIAL.—The judgment in a civil case will not be disturbed where there is a substantial conflict in the evidence, upon the ground that the verdict is against the evidence. *Id.*

INSUFFICIENCY OF EVIDENCE. (See Statement, 1.) 78. (See Criminal Law, 6.) 300.

ASSESSOR'S STATEMENT, WHEN TO BE TAKEN AS EVIDENCE OF VALUATION. (See Assessor, 1.) 89.

TESTIMONY OF DEFENDANT IN A CRIMINAL CASE. (See Criminal Law, 3.) 125.

OPINION OF WITNESSES, WHEN NOT ADMISSIBLE. (See Criminal Law, 4.) 125.

TESTIMONY OF DEFENDANT'S BELIEF AT TIME OF HOMICIDE ADMISSIBLE. (See Criminal Law, 5.) 126.

EXPRESSION OF OPINION OR FACT. (See Fraudulent Representations, 3.) 151.

RELEVANCY OF TESTIMONY IN BURGLARY. (See Criminal Law, 7, 8.) 327.

INSUFFICIENCY OF EVIDENCE TO CONSTITUTE THE CRIME OF BURGLARY. (See Burglary, 3, 4.) 401.

EVIDENCE IN CRIMINAL CASE, WHEN PART OF THE RECORD ON APPEAL. (See Criminal Law, 11, 12.) 403.

WHEN EVIDENCE OF DAMAGES IS ADMISSIBLE. (See Damages, 1.) 423.

WHEN TRUST MAY BE PROVED BY PAROL. (See Trust, 3.) 446.

CONFLICT OF EVIDENCE. (See Findings, 2.) 446.

EXECUTION.

1. PROCEEDINGS SUPPLEMENTARY TO EXECUTION—STATUTES CONSTRUED.—In proceedings supplementary to execution the judgment creditor can, in a summary manner, compel the disclosure of any property belonging to the judgment debtor in the hands, or under the control of any other person, and of any indebtedness due to the judgment debtor. *Hagerman v. Tong Lee*, 332.

2. *IDEM.*—The judge or referee can only order property to be applied to the satisfaction of the judgment when the debtor's title thereto is clear and undisputed. *Id.*

3. *IDEM.*—If there is any dispute as to the ownership of the property, or if the person proceeded against in good faith denies the debt, neither the judge or referee has any power or authority to decide the disputed ques-

tion and order the property to be delivered, or money adjudged to be due to be paid over, in satisfaction of the judgment. *Id.*

4. *IDEM.*—If the debt is denied, the only course for the plaintiff to pursue is to apply for an order forbidding any transfer or other disposition of the debt, and for an order authorizing the commencement of an action in the proper court for the recovery of the debt as provided in section 246 of the civil practice act. *Id.*

FINDINGS.

1. *FINDINGS OF COURT—WHEN SHOULD BE MADE SPECIFIC.*—In the settlement of partnership accounts, the referee, in a general finding, allowed appellant a certain sum of money without giving a statement of the particular accounts allowed: *Held*, that appellant, if he desired to have the account reviewed, should have asked for a specific finding containing an itemized statement of the accounts allowed, and also a statement of the particular accounts disallowed by the referee. *Young v. Clute*, 31.
2. *CONFLICT OF EVIDENCE—FINDINGS.*—The findings of the court will not be disturbed where the evidence is conflicting. *Boskowitz v. Davis*, 446.

FINAL JUDGMENT.

SEPARATE APPEAL FROM JUDGMENT. (See Appeal, 2.) 20.

FRAUD.

See *FRAUDULENT CONVEYANCES.*

See *FRAUDULENT REPRESENTATIONS.*

See *STATUTE OF FRAUDS.*

ILLEGAL CONTRACTS. (See Contracts, 1.) 195.

PAYMENT ON NOTES, HOW CREDITED. (See Payments, 1.) 195.

FRAUDULENT CONVEYANCE.

1. *FRAUDULENT GRANTOR CANNOT OFFER EVIDENCE TO SHOW THAT CONVEYANCE WAS FRAUDULENT.*—December 12, 1870, appellant conveyed certain real estate to K. January 3, 1871, K. conveyed the same property to Y. September 4, 1871, Y. conveyed it to appellant. April 15, 1871, respondent recovered judgment against K., had the property sold, and became the purchaser at an execution sale, and thereafter commenced this suit to recover the property. Upon the trial appellant offered to prove that her deed of December 12, 1870, was made for the purpose of placing the property where her creditors could not reach it, so as to enable her to get money from New York to pay her liabilities; that K. agreed to reconvey the property upon demand; that the conveyances from K. to Y. and from Y. to her were made in furtherance of this agreement, she having in the meantime paid her liabilities. The court refused to allow this testimony: *Held*, that this action of the court was correct; that it was not an offer to prove a trust, but was an offer to prove that K. was a fraudulent grantee as against the creditors of appellant. *Allison v. Hagan*, 38.
2. *IDEM—RIGHTS OF CREDITORS.*—Appellant's creditors could have defeated

the conveyance upon the ground of want of consideration, or on the ground of fraud, but neither K. nor appellant could do so as against K.'s creditors. Subsequent to that conveyance the property was subject to the claims of K.'s creditors, and K. could have sold it and given it as good title to it as any other property owned by him. *Id.*

3. *IDEM.*—As between the parties to a fraudulent conveyance or between a fraudulent grantee and his creditors, courts will not permit either the fraudulent grantor or grantee to be heard in avoidance of the fraudulent act. *Id.*
4. *IDEM*—*BONA FIDE PURCHASER.*—It is a well-settled rule in equity that a purchaser with notice from a *bona fide* purchaser for a valuable consideration, who bought without notice, may protect himself under the first purchaser. The only exception to this rule of law is where the estate becomes re-vested in the original party to the fraud, when the original equity will re-attach to it in his hands. *Id.*

EFFECT OF CONVEYANCES TO DEFRAUD CREDITORS. (See Instructions, 3, 4.)
39.

ILLEGAL CONTRACTS. (See Contracts, 1.) 195.

FRAUDULENT REPRESENTATIONS.

1. *FRAUDULENT REPRESENTATIONS—ADMISSIONS IN ANSWER.*—In an action to recover damages for alleged false and fraudulent representations in the sale of land, the plaintiff, among other things, alleged that defendant represented that all the waters of Thomas creek "belonged to him, to use and appropriate as his own," upon the Geller ranch; that said representations were false, and were made to deceive plaintiff, and to induce him to purchase said ranch. The defendant, in his answer, denied that he had ever made any such representations, and among other things, alleged that no water, water rights, or privileges of any kind were mentioned in his deed to plaintiff, "nor were they appurtenances of said ranch or land:" *Held*, that the plaintiff, under the pleadings, was not required to offer any proof that the waters of Thomas creek did not belong to, or were not appurtenant to, the Geller ranch, and that the defendant was estopped, by the averments and admissions in his answer, from relying upon any such defense. *Banta v. Savage*, 151.
2. *REPRESENTATIONS, WHEN FRAUDULENT.*—No representations, however false, amount to a fraud in law, unless it be of a fact, which fact is material to the contract or transaction. *Id.*
3. *IDEM—EXPRESSIONS OF OPINION OR FACT.*—The mere expression of an opinion which does not involve the assertion of a fact, although the opinion be incorrect, will not make the person expressing it liable in an action for false and fraudulent representations. *Id.*
4. *IDEM—PROVINCE OF A JURY.*—It was the province of a jury, under the facts and circumstances of this case, to decide whether the representations, as made by defendant, were intended as the statement of a fact and whether they were so received and acted upon by defendant, or were mere expressions of opinion. *Id.*

HABEAS CORPUS.

1. *HABEAS CORPUS—SUFFICIENCY OF PETITION.*—A petition for *habeas corpus* which fails to state any facts from which it can be inferred that peti-

tioner's imprisonment is illegal, is insufficient to authorize the issuance of the writ. *Ex parte Allen*, 87.

2. **IDEM—SECTION 368 COMPILED LAWS CONSTRUED.**—The provisions of the statute that the writ should issue "where a party has been committed on a criminal charge without reasonable or probable cause," only applies to cases where the evidence given upon the examination is insufficient to warrant the committing magistrate in holding the prisoner to answer. *Id.*
3. **IDEM.**—Petitioner cannot claim the issuance of a writ of *habeas corpus* for the sole purpose of impeaching the witnesses who testified against him at his examination. *Id.*

JURISDICTION IN CONTEMPT CASES. (See Contempt, 2, 3.) 159.

HIGHWAY.

See **ROADS**.

HOMESTEAD.

1. **HOMESTEAD BUILT WITH PARTNERSHIP FUNDS.**—A decree ordering the sale of property claimed of one of the partners as a homestead, will not be set aside where the evidence shows that the partnership is insolvent; that the partner claiming the homestead is largely indebted to it; that partnership funds were used to a considerable extent in building the house claimed as a homestead; and there is some evidence that the land was purchased and improvements made with money derived from that source alone. *Rhodes v. Williams*, 21.

SEPARATE APPEAL FROM JUDGMENT. (See Appeal, 1.) 20.

WHEN WIFE IS A NECESSARY PARTY. (See Partnership, 1.) 20.

HOMICIDE.

1. **HOMICIDE NOT JUSTIFIED BY PROVOCATION.**—The court instructed the jury that: "No provocation can justify or excuse homicide; but may reduce the offense to manslaughter. Words or actions, or gestures, however grievous or provoking, unaccompanied by an assault, will not justify or excuse murder; and when a deadly weapon is used, the provocation must be great to make the crime less than murder:" *Held*, not erroneous. (*State v. Raymond*, 11 Nev. 98. affirmed.) *State v. Crozier*, 300.
2. **SUFFICIENCY OF INDICTMENT FOR MURDER.**—The decision in *State v. Thompson, ante*, to the effect that an indictment for murder drawn in the approved form of the common law is sufficient to sustain a verdict for murder in the first degree, without the use of the words deliberately and premeditatedly, affirmed. *Id.*
3. **HOMICIDE—INSTRUCTIONS RELATING TO MURDER.**—The court, at the request of the prosecution, instructed the jury "that the true difference between simple murder (or murder of the second degree) and murder of the first degree, under our statute, does not consist in the length of time the assailant must have deliberated, but whether he had at or before striking the fatal blow, or firing the fatal shot, formed the design to slay the deceased. If such design was formed, however recently, it will be murder of the first degree:" *Held*, that when it read in connection with the other instructions it could not have prejudiced the defendant. *State v. Ah Mook*, 369.

4. **IDEM.**—The court, at the request of the prosecution, also instructed the jury “that the premeditation or intent to kill need not be for a day, an hour, or even a minute, for if the jury believe from the evidence there was a design, a determination to kill, distinctly formed in the mind at any moment before or at the time the pistol was fired, it was a willful, deliberate and premeditated killing, and therefore murder in the first degree:” *Held*, ambiguous but not necessarily erroneous, and that when read in connection with a proper construction defining manslaughter, it could not have prejudiced the defendant. (HAWLEY, C. J., *dissenting.*) *Id.*
5. **IDEM—MEANING OF DELIBERATION.**—The words “a design, a determination to kill, distinctly formed in the mind,” in their natural sense imply deliberation. (HAWLEY, C. J., *dissenting.*) *Id.*
6. **INSTRUCTIONS RELATING TO MURDER.**—The instructions given in this case relative to the distinction between murder in the first and murder in the second degree, criticized and held not to be erroneous in any sense that could have prejudiced the defendant. *State v. Harris*, 414.

HOSTILE DEMONSTRATIONS AND OVERT ACTS. (See Instructions, 7, 8, 9.) 125.

TESTIMONY OF DEFENDANT’S BELIEF AT TIME OF HOMICIDE, ADMISSIBLE. (See Criminal Law, 5.) 126.

SUFFICIENCY OF INDICTMENT FOR MURDER IN THE FIRST DEGREE. (See Indictment, 1.) 140.

INSTRUCTIONS ON SAME POINT, HOW CONSIDERED. (See Instructions, 11.) 369.

FORM OF INDICTMENT FOR CHARGING MURDER. (See Indictment, 2, 3.) 414.

INDICTMENT.

1. **INDICTMENT—MURDER IN THE FIRST DEGREE—WILLFUL, DELIBERATE AND PREMEDITATED.**—In order to sustain a conviction of murder in the first degree, it is not essential that the indictment should state the words “willfully, deliberately and premeditatedly.” in addition to the words “unlawfully and with malice aforethought.” *State v. Thompson*, 140; *State v. Crozier*, 300.
2. **INDICTMENT—FORM OF, IN CHARGING MURDER.**—An indictment which specifically accuses the defendant “of the crime of murder” instead of using the general words “of a felony” is unobjectionable. *State v. Harris*, 414.
3. **IDEM—“CONTRARY TO THE FORM OF THE STATUTE.”**—The words “contrary to the form of the statute,” etc., are not essential in an indictment for murder, which is a common law offense. *Id.*
4. **OBJECTIONS TO AN INDICTMENT—WHEN NO GROUND OF DEMURRER.**—An objection that an indictment has not been found, indorsed or presented as prescribed by law, is not a ground of demurrer, but must be taken by motion to set aside the indictment before pleading to it. *Id.*
5. **IDEM.**—An objection that the indictment was not signed by the district attorney cannot be made by demurrer, but must be made by motion to set aside the indictment. *Id.*

SUFFICIENCY OF INDICTMENT IN MURDER. (See Homicide, 2.) 300.

INJUNCTION.

1. INJUNCTION IN ACTIONS OF TRESPASS.—The foundation of the jurisdiction in a court of equity to issue an injunction, in aid of the action of trespass, is the probability of irreparable injury; the inadequacy of pecuniary compensation; or the prevention of a multiplicity of suits. *Thorn v. Sweeney*, 251.
2. IDEM—PLEADINGS—IRREPARABLE INJURY.—It is not sufficient that the complaint alleges that the injury would be irreparable. The plaintiff must affirmatively state the necessary facts to show the court that the injury will be irreparable. *Id.*
3. IDEM.—The construction of a ditch across rocky, barren and uncultivated lands is not an irreparable injury. *Id.*
4. IDEM—REMEDY AT LAW—CONTINUING TRESPASS.—Where no appreciable injury will be done by the acts of defendants, that are threatened to be continued, and the defendants are solvent and able to respond in damages, an injunction will not be granted, although the title of plaintiff is undisputed. To justify the issuance of an injunction there must be cause to fear irreparable damage for which courts of law furnish no adequate remedy. *Id.*

EQUITY, WHEN NOT THE PROPER REMEDY. (See Equity, 1.) 78.

EASEMENT IN LAND. (See Easement, 1.) 251.

INSANITY.

INSANITY AND INTOXICATION.—Instructions given by the court to the effect that temporary insanity produced by intoxication does not destroy responsibility, if the party, when sane and responsible, made himself voluntarily intoxicated: *Reviewed*, and held to be correct. *State v. Thompson*, 140.

INSOLVENCY.

INSOLVENCY OF PLAINTIFF WHEN SUFFICIENT TO INVOKE THE EQUITABLE POWER OF THE COURT. (See Pleadings, 3.) 225.

INSOLVENCY OF COPARTNERSHIP. (See Partnership, 7.) 286.

AGREEMENT WITH INSOLVENT DEBTORS. (See Trusts, 1, 2.) 306.

INSTRUCTIONS.

1. WHEN INSTRUCTION SHOULD BE REWRITTEN—MODIFICATION OF.—The court modified an instruction by erasing the words, "and the jury must find for the defendant" with one stroke of the pen, leaving them legible to the jury: *Held*, that it was the privilege of appellant to ask leave to rewrite the instruction, or obliterate the rejected words, and not having done so, she is not in a position to complain of the action of the court, the instruction being otherwise correct. *Allison v. Hagan*, 39.
2. INSTRUCTIONS MUST BE CONSTRUED AS A WHOLE.—In determining whether any given instruction is erroneous, the whole must be taken together, and considered as an entirety. *Id.*
3. IDEM—EFFECT OF CONVEYANCES MADE TO DEFRAUD CREDITORS.—The following instruction: "If you believe, from the evidence, that the deed

from K. to Y. was made with the understanding that Y. was to hold the property until such time as K. desired, and that then it should be conveyed by Y. as K. should direct, and that such conveyance was intended to hinder and delay the creditors of K., and that the defendant knew of such understanding, and she further knew the fact before the conveyances were made to her by Y. and K. on the fourth day of September, 1871, that K. was indebted to plaintiff at the time, your verdict must be in favor of the plaintiff:" *Held*, correct. *Id.*

4. *IDEM*.—The court gave the following instruction: "If the jury believes, from the evidence, that the conveyance made by K. to Y. on the third of January, 1871, was made for the purpose of hindering, delaying or defrauding the creditors of K. in recovering the debt due by K. to plaintiff, and that the defendant was aware that said conveyance was made for such purpose before the conveyances were made by Y. and K., your verdict must be for plaintiff:" *Held*, correct. *Id.*
5. INSTRUCTIONS—DUTY OF COUNSEL.—If counsel for appellant thought the jury were not cognizant of the construction placed upon the statutes by the court in its instruction, the same being correct, it was their duty to prepare proper instructions upon the subject, and ask the court to give them. *Id.*
6. SECTION 2306 COMPILED LAWS CONSTRUED.—Section 2306 of the compiled laws only requires the court specially to instruct the jury that "no inference of guilt is to be drawn against him for that cause" when the defendant "declined to testify." It has no application to a case where the defendant voluntarily makes himself a witness in his own behalf. *State v. Harrington*, 125.
7. INSTRUCTION — HOSTILE DEMONSTRATIONS AND OVERT ACTS.—Defendant asked the court to instruct the jury that, "If the deceased made threats to the effect that he intended to kill * * * defendant, * * * and such threats had been communicated to the defendant; and if at the time, and just previous to the killing, the deceased made hostile demonstrations toward the defendant, and the demonstrations * * * were such as to justify the belief that the deceased intended to carry out his threats, then the defendant would be justified in killing him, without retreating: *Held*, erroneous in this, that it failed to state many of the necessary elements of justification. *Id.*
8. *IDEM*—MODIFICATION OF.—The court modified the instruction by inserting after "hostile demonstration" the words, "or overt act," and added to the instruction the words: "But if it does not appear that the threats were followed by any overt act, the mere apprehension of danger is not sufficient to justify homicide," and then gave the instruction as modified: *Held*, not erroneous. *Id.*
9. *IDEM*—MEANING OF "OVERT ACTS."—The term "overt acts" as used by the court meant any act of the deceased, which manifested to the mind of a reasonable person a present intention on his part to kill defendant, or do him great bodily harm. *Id.*
10. INSTRUCTIONS ASSUMING FACTS, WITHOUT ALLUDING TO THE EVIDENCE.—An instruction which assumes that from former threats, the deceased, at the time of the homicide, had murderous intentions," and that deceased had, previous to the killing, attempted to assault defendant, regardless of any evidence to establish such facts. is clearly erroneous. *Id.*

11. INSTRUCTIONS ON SAME POINT, HOW CONSTRUED. — Where two instructions are given on the same point, one clearly and unequivocally correct, the other ambiguous and susceptible of two constructions, according to one of which it is correct, but according to the other of which it is erroneous, as it is the duty of the jury to read and consider all the instructions together they will put that construction upon the doubtful one which makes it consistent with the other, and reject that construction which brings the two in conflict. *State v. Ah Mook*, 369.

HOMICIDE NOT JUSTIFIED BY PROVOCATION. (See Homicide, 1.) 300.

CHARGE OF THE COURT MUST BE EMBODIED IN A BILL OF EXCEPTIONS. (See Bill of Exceptions, 1.) 369.

INSTRUCTIONS RELATING TO MURDER. (See Homicide, 3, 4, 5.) 369.

INSANITY AND INTOXICATION. (See Insanity, 1.) 140.

ISSUES.

ISSUES OF FACT MUST BE TRIED BY A JURY. (See Jury, 1, 2, 3.) 108.

JUDGMENT.

1. JUDGMENT IN BAR MUST BE PLEAD. — Where it is claimed that a former judgment is a bar, it must be plead. *State ex rel. Twaddle v. County Commissioners of Washoe County*, 17.

2. CERTIORARI—JUDGMENT OF DISTRICT COURT, WHEN NOT A BAR. — In an application made to the district court for a writ of certiorari, petitioner averred that the petition to the commissioners to vacate the highway "had been signed by fourteen freeholders;" and in his application to this court stated that his petition was signed "by no more than fourteen freeholders:" *Held*, that this difference is material, and that the judgment of the district court dismissing the application is no bar to this proceeding. *Id.*

SEPARATE APPEAL OF WIFE FROM JUDGMENT CONCERNING HOMESTEAD PROPERTY. (See Appeal, 1.) 20.

WHEN DECREE IS NOT FINAL. (See Appeal, 2.) 20.

APPEAL FROM ORDERS AFTER FINAL JUDGMENT. (See Appeal, 3, 4, 5.) 102.

WHEN JUDGMENT SHOULD BE AFFIRMED IN A CRIMINAL CASE. (See Criminal Law, 1.) 118.

JURISDICTION OF COURT TO SET ASIDE JUDGMENT AFTER EXPIRATION OF TERM. (See Jurisdiction, 1.) 118.

JUDGMENT OF CONVICTION IN CONTEMPT—WHEN FINAL AND CONCLUSIVE. (See Contempt, 4.) 159.

JURISDICTION.

JURISDICTION OF COURT AFTER EXPIRATION OF TERM. — The district court has no jurisdiction at a subsequent term to set aside a default or vacate a decree or judgment rendered at a previous term of court unless its jurisdiction is saved by some proper proceeding instituted within the time allowed by law. *Daniels v. Daniels*, 118.

JURISDICTION OF COUNTY COMMISSIONERS TO CLOSE PUBLIC ROADS. (See County Commissioners, 1.) 17.

JURISDICTION OF COUNTY COMMISSIONERS MUST BE AFFIRMATIVELY SHOWN.
(See County Commissioners, 2.) 28.

JUSTICES' COURTS HAVE NO JURISDICTION OF EQUITABLE DEFENSES. (See Equity, 2.) 94.

COURTS HAVE NO JURISDICTION TO TRY ISSUES OF FACT WITHOUT CONSENT OF PARTIES. (See Jury, 2.) 108.

SUFFICIENCY OF AFFIDAVIT IN CONTEMPT CASES. (See Contempt, 1.) 158.

INQUIRY UPON CERTIORARI. (See Certiorari, 1, 2, 3, 4, 5, 6, 7.) 158.

JURISDICTION IN CRIMINAL CASES IS LIMITED TO QUESTIONS OF LAW ALONE.
(See Criminal Law, 13.) 403.

JURY.

1. RIGHT OF TRIAL BY JURY.—The right of trial by jury is a sacred constitutional right of which no litigant, in a proper case, can be deprived without his consent. *Treadway v. Wilder*, 108.
2. IDEM—JURISDICTION OF COURT.—A court has no jurisdiction to try an issue of fact in an action at law unless a jury is waived by consent of parties. *Id.*
3. IDEM—WHEN A NEW TRIAL SHOULD BE GRANTED.—If the court refuses a demand for a jury to try issues of fact in an action at law, and tries the case without a jury, it is the duty of the appellate court, notwithstanding the fact that such issues may have been fairly tried and proper judgments rendered by the court, to grant a new trial. (BEATTY, J., *dissenting.*) *Id.*
4. JURY LAW OF 1875—REPEALING CLAUSE IN AN UNCONSTITUTIONAL STATUTE. The principle decided in *State v. McClear* (11 Nev. 39), that the effect of declaring certain parts of the jury law of 1875 unconstitutional and void is to leave in full force the sections of the law of 1861, which the act of 1875 attempted to repeal, affirmed. *State v. Crozier*, 300.
5. SEPARATION OF JURY.—The fact that one of the jurors was where he could exchange a single word with a stranger without being overheard by the officer in charge is sufficient to establish a technical separation of the jury. *State v. Harris*, 414.

EQUITY CASE BEFORE A JURY, WHEN MOTION FOR NEW TRIAL MUST BE MADE.
(See New Trial, 1.) 94.

EQUITABLE ISSUES, HOW TRIED. (See Equity, 3.) 108.

UNCONSTITUTIONAL JURY LAW. (See Evidence, 5.) 121.

PROVINCE OF JURY TO DETERMINE FACTS. (See Fraudulent Representations, 4.) 151.

DUTY OF OFFICER TO PREVENT SEPARATION OF THE JURY. (See Criminal Law, 14.) 414.

JUSTICE OF THE PEACE.

JUSTICES' COURTS HAVE NO JURISDICTION OF EQUITABLE DEFENSES. (See Equity, 2.) 94.

LANDS.

TOWN SITE ACT CONSTRUED. (See Town Site, 1-5.) 65.

ADVERSE POSSESSION. (See Limitations, 2, 3.) 108.

- REAL ESTATE, WHEN PARTNERSHIP PROPERTY. (See Partnership, 8, 9.) 286.
- WHAT CONSTITUTES ACTUAL POSSESSION OF LAND. (See Possession, 2.) 345.
- WHEN AGRICULTURAL LAND NEED NOT BE FENCED. (See Possession, 3.) 345.
- MARKING OF BOUNDARIES AND EXTENT OF POSSESSORY CLAIMS TO PUBLIC LAND. (See Possession, 4, 5.) 345.
- RIGHTS OF ALIENS TO PUBLIC LANDS. (See Alien, 1.) 345.
- POSSESSION OF LAND UNDER PAROL CONTRACT. (See Ejectment, 1.) 393.
- RESULTING TRUST IN THE PURCHASE OF LAND. (Trust, 4, 5, 6.) 446.

LARCENY.

- INTENT NECESSARY TO CONSTITUTE LARCENY. (See Burglary, 3.) 401.

LEGAL TITLE.

- ADVERSE POSSESSION. (See Limitations, 2.) 108.
- DEED OF LAND TO T. B. & BRO. CONVEYS LEGAL TITLE TO T. B. (See Deed, 1.) 361.

LICENSE.

- LAW IMPOSING A LICENSE ON DRUMMERS AND TRAVELING MERCHANTS HELD CONSTITUTIONAL. (See Constitution, 1.) 263.
- PAROL LICENSE—WHEN IRREVOCABLE. (See Parol License, 1.) 280.

LIENS.

1. LIEN FOR KEEPING ANIMALS, WHEN LOST.—The statutory lien (1 Com. L., 144-6) for keeping animals is lost when the possession is parted with. *Cardinal v. Edwards*, 5 Nev. 36, affirmed; *Estey v. Cooke*, 278.

LIMITATIONS.

1. STATUTE OF LIMITATIONS, HOW CONSTRUED.—The statute of limitations, like any other statute, is to be construed according to the manifest intention of the legislature, and in ascertaining such intention the language used should be construed, if possible, according to the usual meaning of the words used. *Treadway v. Wilder*, 108.
2. IDEM—LEGAL TITLE.—Under section 1022, vol. 1, compiled laws, a party is entitled to maintain an action for the possession of real property at any time before the expiration of five years of adverse possession after he obtained the legal title. *Id.*
3. IDEM—CERTIFICATE OF PURCHASE.—Where the legal title remains in the government until the issuance of a patent the statute of limitation does not commence to run until that date, the time between the date of the certificate of the purchase and of the issuance of the patent is not to be computed as a part of the five years of adverse possession. *Id.*

MANDAMUS.

1. MANDAMUS—WHEN NOT THE PROPER REMEDY. — Mandamus is not the proper remedy where relator has a plain, speedy and adequate remedy at law. *State ex rel. Elliott v. Guerrero*, 105.
2. IDEM—MINING STOCKS.—Where relator claims that he is the owner of and

entitled to certain certificates of mining stock which the trustees of a corporation refuses to issue to him: *Held*, that mandamus is not the proper remedy, as he has an adequate remedy at law by an action against the corporation for the value of the stock claimed. *Id.*

3. **IDEM—RIGHT OF THIRD PERSONS.**—Mandamus ought not to be issued to compel the trustees of a corporation to issue certain certificates of stock to relator where it appears from the petition that the stock is also claimed by other persons not parties to the proceedings before the court. *Id.*
4. **WHEN MANDAMUS SHOULD ISSUE.**—If the acts which the state controller refused to perform concern the public interests, and are such as the law requires to be performed by him, the writ of mandamus should issue to compel the performantce of such duty. *State ex rel. Drake v. Hobart*, 408.

MECHANICS' LIEN.

1. **MECHANICS' LIEN—COUNTY RECORDER AUTHORIZED TO ADMINISTER OATH.** Under the provisions of the statute of this state, county recorders are authorized to administer the oath and certify to the verification required by law in filing mechanics' liens. *Arrington v. Wittenberg*, 99.

MINING CLAIMS.

1. **ACTION TO DETERMINE THE RIGHT OF POSSESSION OF A MINING CLAIM.**—Under section 1674 of the compiled laws, which is designed to supplement section 2326 of the revised statutes of the United States, the pendency of a contest in the land-office, with respect to a mining claim, gives the district courts jurisdiction to determine the right of possession as between the adverse claimants. *Golden Fleece v. Cable Consolidated M. Co.*, 312.
2. **IDEM—PROOFS HOW MADE—ACTUAL POSSESSION.**—Each party must prove his claim to the premises in dispute, and the better claim must prevail. Actual possession makes out a *prima facie* case for the contestant and throws upon the defendant the burden of proving a superior right in himself. *Id.*
3. **IDEM—PROOF OF ACTUAL POSSESSION NOT NECESSARY.**—Plaintiff may sustain this action without proving actual possession. A right to the possession is all that is necessary. *Id.*
4. **POSSESSION OF MINING GROUND, HOW PROVED.**—Proof of a clearly defined surface claim surveyed and marked by a United States surveyor in accordance with law, including a quartz lode running with the claim, and work on the vein inside of the surface claim, and within the lines of the disputed ground, is proof of possession sufficient to put the defendant on proof of its right. *Id.*
5. **ALIENS CANNOT LOCATE OR HOLD MINING CLAIMS.**—An alien who has never declared his intention to become a citizen, is not a qualified locator of mining ground, and he cannot hold a mining claim either by actual possession or by location against one who connects himself with the government title by compliance with the mining law. *Id.*
6. **LOCAL MINING DISTRICTS AND RULES.**—The mining laws of the United States recognize and sanction the custom among the miners of organized mining districts to adopt local laws or rules governing the location, recording and working of claim not in conflict with the state or federal legislation. *Id.*

7. **IDEM—TITLES TO MINING CLAIMS, HOW ACQUIRED.**—It is not essential that mining districts should be organized, and local rules adopted, in order that mining claims may be held and the government titles acquired. A compliance with the mining laws of the United States is sufficient to secure the claim. *Id.*
8. **RE-LOCATION OF MINING GROUND.**—Where the first claimant who takes up the claim is not a citizen, or has forfeited his right by non-compliance with the mining laws, or abandoned his claim, the mining ground staked off by him is open to location by any citizen of the United States. *Id.*
9. **MINING RECORDER—PROOF AS TO RECORD OF CLAIM WHEN INADMISSIBLE.** Proof of a record is irrelevant without proof of some regulation making a record obligatory, or giving it some effect. The public law does not of itself create any such office as mining recorder; nor does it make the recording of claims obligatory, or give to a record any effect. *Id.*
10. **IDEM—LOCAL RULES.**—The record is to be provided for, and its effect determined by the local laws or regulations of miners in the respective mining districts, and if they fail to provide for a record, then none is required. *Id.*
11. **IDEM.**—If a record is provided for by local rules it must, under the provisions of the mining laws of the United States, contain an accurate description of the *locus* of the claim by reference to natural objects or permanent monuments. *Id.*
12. **PROOF AND EFFECT OF LOCATION BY ALIENS—QUESTION OF CITIZENSHIP, HOW DETERMINED.**—Leonard, one of the five locators of the mining claim of defendant, stated, on cross-examination, that at the date of the location he was not a citizen, and had never declared his intention to become one. The court thereupon decided that the location of the claim was void, and excluded all evidence in regard to it, including the deeds of conveyance from Leonard and his associates to defendant: *Held*, that this action of the court was erroneous; that, as Leonard had parted with his interest, his admissions were not binding on his grantees, and that the question of citizenship was one for the jury, not the court, to decide. *Id.*
13. **IDEM—RIGHTS OF CO-LOCATORS.**—There being no evidence tending to show that Leonard's co-locators were aware of his disability, or were colluding with him in his attempted fraud, if he was an alien: *Held*, that in such a case the law would be sufficiently vindicated by holding that the alien's claim is void. *Id.*
14. **LOCATION OF MINING CLAIMS—WHEN SURFACE LINES CANNOT BE CHANGED.** Under the mining laws of the United States, unaided by any supplementary miners' rules, there is no way of locating a quartz vein, except by marking out surface lines, and when these lines have been marked, they cannot be changed so as to take in ground that has been located by others prior to such attempted change. *Id.*

MINING STOCK. (See *Mandamus*, 2.) 105.

MORTGAGE.

NOTICE OF COPARTNERSHIP IN REAL ESTATE. (See *Partnership*, 6.) 286.

MURDER.

See *HOMICIDE*.

NEW TRIAL.

1. **EQUITY CASE BEFORE A JURY—WHEN MOTION FOR NEW TRIAL MUST BE MADE.**—When the court in the trial of an equity case calls a jury to decide special issues and the jury also find a general verdict: *Held*, that the presumption is, that the court only called the jury as advisory; that until the verdict has been sanctioned by the court it is no proof that it was actually rendered in the case, and that the party against whom the verdict is found is entitled to ten days after the findings are filed by the court in which to give his notice to move for a new trial. *Duffy v. Moran*, 94.

2. **SEPARATION OF JURY—WHEN NEW TRIAL WILL NOT BE GRANTED.**—Where it is shown to the satisfaction of the court that there was no misconduct on the part of the juror, the mere separation of the jury is not a sufficient ground for a new trial. *State v. Harris*, 414.

STATEMENT ON MOTION FOR NEW TRIAL. INSUFFICIENCY OF EVIDENCE. (See Statement, 1.) 78.

A NEW TRIAL SHOULD BE GRANTED WHEN A PARTY HAS BEEN DEPRIVED OF HIS RIGHT TO A JURY TRIAL. (See Jury, 3.) 108.

OBJECTIONS.

1. **WHEN OBJECTIONS MUST BE MADE.**—Appellants cannot complain of the action of the court in striking out the answers of a witness that are not responsive to the questions asked, unless objection is made and the right to have proper answers given insisted upon in the court below. *Boskowitz v. Davis*, 446.

WHEN OBJECTIONS TO PLEADINGS SHOULD BE MADE IN THE COURT BELOW. (See Pleadings, 6.) 280.

OFFICE AND OFFICER.

1. **OFFICE OF STATE CONTROLLER.**—The office of state controller is one of public trust, and is conferred upon the individual for the benefit of the public. *State ex rel. Drake v. Hobart*, 408.

COUNTY RECORDER AUTHORIZED TO ADMINISTER OATH IN VERIFICATION OF MECHANICS' LIEN. (See Mechanics' Lien, 1.) 99.

MINING RECORDERS. (See Mining Claims, 9, 10, 11.) 312.

DUTY OF CLERKS IN PREPARING RECORD ON APPEAL IN CRIMINAL CASES. (See Criminal Law, 10.) 369.

DUTY OF STATE CONTROLLER. (See Mandamus, 4.) 408. (Taxes, 6.)

DUTY OF DISTRICT ATTORNEY. (See Taxes, 5.) 408.

DISTRICT ATTORNEYS ARE AUTHORIZED TO APPOINT DEPUTIES. (See District Attorney, 1.) 414.

DUTY OF OFFICER IN CHARGE TO PREVENT SEPARATION OF JURY. (See Criminal Law, 14.) 414.

PAROL AGREEMENT.

PART PERFORMANCE. (See Statute of Frauds, 4, 5, 6, 7.) 393.

PAROL EVIDENCE.

WHEN PAROL EVIDENCE IS ADMISSIBLE. (See Evidence, 7.) 225.

WHEN A TRUST MAY BE PROVED BY PAROL. (See Trust, 3.) 446.

PAROL LICENSE.

1. PAROL LICENSE, WHEN IRREVOCABLE.—A parol license to erect a dam upon another's land for the purpose of running a flouring-mill, is irrevocable after the party to whom the license is given has executed it by erecting the mill, or otherwise expending money upon the faith of the license. *Lee v. McLeod*, 280.

PARTIES.

- WHEN WIFE IS A NECESSARY PARTY DEFENDANT. (See Partnership, 1.) 20.
- AMENDMENT OF PLEADINGS—WHEN WILL RELEASE SURETIES. (See Pleadings, 5.) 234.
- RIGHTS OF THIRD PARTIES—AMENDMENT OF PLEADINGS. (See Amendments, 1.) 235.

PARTNERSHIP.

1. DISSOLUTION OF COPARTNERSHIP—WHEN WIFE IS A NECESSARY PARTY DEFENDANT.—In an action to dissolve a copartnership, where one of the questions involved in the suit is whether the property described in the complaint is the homestead of the defendant or the property of the partnership, the wife of the defendant is a necessary party to the action. *Rhodes v. Williams*, 20.
2. PARTNERSHIP PROPERTY MAY BE SOLD WITHOUT THE RIGHT OF REDEMPTION.—Where the property of an insolvent partnership is ordered to be sold in order to pay the partnership debts, the right of redemption does not exist. *Id.*
3. DISSOLUTION OF COPARTNERSHIP—PAYMENT OF TAXES.—Where an agreement was made between C. and Y., copartners, that the partnership existing between them should be dissolved; that C. should take all the real estate and personal property of the firm at a certain value, nothing being said about the taxes then existing against the property; that C. should pay the indebtedness of the firm included in a certain list, and that the liability of the firm, not included in the list, should be paid out of money collected from the outstanding accounts due the firm: *Held*, that the taxes should be paid out of the copartnership's funds. *Young v. Clute*, 31.
4. IDEM—COSTS.—The allowance or disallowance of costs in actions to settle copartnership accounts is within the discretion of the court. *Id.*
5. SURVIVING PARTNER—RIGHT OF ACTION.—A surviving partner is entitled to sue in his representative capacity for the amount due the partnership, and in his own name for the amount due to himself individually. The respective demands may be united in the same action, but should be separately stated. *Quillen v. Arnold*, 235.
6. PARTNERSHIP IN REAL ESTATE—NOTICE OF COPARTNERSHIP.—Lowe and Griswold were copartners in the business of saloon-keeping, and owned the lot and building they occupied, each holding the legal title to an undivided one-half. Lowe mortgaged his half interest, and upon the foreclosure of this mortgage, Griswold, having purchased the property under an execution sale in a suit brought by certain of the creditors against the copartnership, claimed that the real estate belonged to the copartnership, and was subject to the payment of the copartnership

liabilities: *Held*, that the legal title to the property mortgaged having been in Lowe, it was incumbent upon Griswold to prove that such property was in fact a portion of the partnership assets, and that the mortgagees had notice thereof. *Hogle v. Lowe*, 286.

7. **IDEM—INSOLVENCY OF COPARTNERSHIP.**—If the premises were in fact partnership property, and the mortgagees had notice of such fact, the mortgagees would then be bound to inquire concerning the firm's indebtedness. *Id.*
8. **REAL ESTATE, WHEN PARTNERSHIP PROPERTY.**—Real estate purchased with partnership funds for partnership purposes, and appropriated to partnership uses, is, in equity, presumed to be partnership property, and it is, under such circumstances, immaterial whether the legal title is taken in the name of a part or all of the partners. *Id.*
9. **IDEM.**—Individual real property brought into the partnership by the co-partners, at the time of its formation or afterward, and, by proper agreement of the partners, converted into partnership property, and appropriated to its uses, becomes a portion of the capital stock of the firm, and will be treated in equity as personalty, although standing in the name of an individual partner. *Id.*
10. **IDEM.**—Upon a review of the testimony in this case: *Held*, that the court did not err in deciding that Lowe and Griswold held the real estate in question as tenants in common, and not as partners, at the date of the mortgage. *Id.*

WHEN DECREE IS NOT FINAL. (See Appeal, 2.) 20.

SALE OF PARTNERSHIP PROPERTY. (See Sale, 1.) 21.

HOMESTEAD BUILT WITH PARTNERSHIP FUNDS. (See Homestead, 1.) 21.

WHEN FINDINGS SHOULD BE MADE SPECIFIC. (See Findings, 1.) 31.

COUNTER-CLAIMS OF COPARTNERSHIP ACCOUNTS—WHEN ALLOWED. (See Pleadings, 2, 3.) 225.

INSOLVENCY OF COPARTNER. (See Pleadings, 3.) 225.

PATENT.

WHEN STATUTES OF LIMITATION COMMENCES TO RUN.

PAYMENTS.

1. **PAYMENTS, HOW CREDITED.**—Where plaintiff held several promissory notes against the deceased, all but one being valid, and also held certain shares of mining stock belonging to deceased: *Held*, that in the absence of any showing to the effect that the deceased ever authorized plaintiff to appropriate the proceeds derived from the sale of such stock toward the discharge of the fraudulent note, the law compelled plaintiff to credit the money upon the valid notes. *McCausland v. Ralston*, 195.

PLEADINGS.

1. **AMENDMENTS OF PLEADINGS—DISCRETION OF COURT.**—A party wishing to amend his pleadings ought, as a general rule, to ask leave of the court to amend when objections to the sufficiency of the pleadings are made, and before the introduction of testimony; but courts in allowing amendments are necessarily clothed with discretionary power, and whenever

an offer is made to amend at any such stage of the proceedings, that the opposite party will not lose an opportunity to fairly present his case; it cannot be said that the court has abused its discretion in allowing an amendment. *McCausland v. Ralston*, 195.

2. COUNTER-CLAIM—COPARTNERSHIP ACCOUNT—PLEADINGS.—As a counter-claim to an action upon a promissory note and upon an account for goods sold, etc., the defendant claimed damages for an alleged breach of contract upon the part of plaintiff, and alleged that plaintiff and defendant were copartners in the saw-mill business, and that it was agreed to put in as a part of defendant's contribution to the capital stock of the partnership, the notes and accounts sued upon. To this plea plaintiff demurred, upon the ground that defendant could not plead an unsettled partnership account as a counter-claim to a demand which is independent of the partnership: *Held*, that the demurrer was not good, because if the averment in the answer was true, the demands sued upon were not independent of the partnership, but were a part of the partnership affairs. *Foulks v. Rhodes*, 225.
3. IDEM—COPARTNERSHIP ACCOUNTS—INSOLVENCY OF PLAINTIFF.—The defendant, in an action brought against him to recover the amount due upon a promissory note, alleged that plaintiff and himself were copartners; that the partnership accounts were unsettled; that upon a settlement the plaintiff would be found largely indebted to defendant; that plaintiff is insolvent, and that defendant will be irreparably damaged by being compelled to pay plaintiff the amount of the note: *Held*, that these averments, if true, afford good grounds for invoking the equitable powers of the court to settle the partnership accounts before trying the legal issues involved in the case. *Id.*
4. IDEM.—Where the defendant and plaintiff entered into a written agreement to construct a flume, and the defendant claimed damages for a breach of that agreement. *Held*, that the damages might be ascertained without settling the accounts of the partnership existing between plaintiff and defendant in the saw-mill business. *Id.*
5. AMENDMENTS TO PLEADINGS—CHANGE OF PARTIES—RELEASE OF SURETIES. Where an attachment was issued in a suit commenced by M. Q. and J. D., administrator of the estate of E. D., deceased, against S., and the defendant gave an undertaking to release the attachment, and thereafter the plaintiffs, without the knowledge of the sureties, were allowed to discontinue the suit against J. D., and to continue the suit as M. Q., surviving partner of the late firm of Q. & D.: *Held*, that under the averments in the pleadings as set forth in the opinion of the court, the parties and the cause of action were so changed by the amendments as to release the sureties from all liability on their undertaking. (HAWLEY, C. J., *dissenting*.) *Quillen v. Arnold*, 234.
6. PLEADINGS, WHEN OBJECTIONS TO SHOULD BE MADE IN THE COURT BELOW.—An objection that evidence tending to establish a parol license ought not to have been admitted because the facts necessary to create a contract, or constitute an equitable estoppel, were not specially pleaded, will not be considered on appeal unless the objection was properly made in the court below. *Lee v. McLeod*, 280.
7. SUPPLEMENTAL PLEADINGS—WHEN SHOULD BE ALLOWED.—When the facts alleged in supplemental pleadings occurred after the original pleadings

were filed, were consistent with and in aid of the original pleadings, and did not bring into the case any new cause of action or any controversy that was not in fact included in the issue originally made, supplemental pleadings should be allowed, if asked for, so as to protect the rights of the respective parties. *Buckley v. Buckley*, 423.

JUDGMENT IN BAR MUST BE PLEAD. (See Judgment, 1.) 17.

EQUITABLE DEFENSES CANNOT BE PLEAD IN JUSTICES' COURTS. (See Equity, 2.) 94.

ADMISSIONS IN ANSWER. (See Fraudulent Representations, 1.) 151.

AMENDMENT OF PLEADINGS—RIGHTS OF THIRD PARTIES. (See Amendments, 1.) 235.

INJUNCTIONS IN ACTIONS OF TRESPASS—IRREPARABLE INJURY. (See Injunction, 2.) 251.

POSSESSION.

1. ACTUAL POSSESSION.—*Eureka M. & S. Co. v. Way*, 11 Nev. 171, as to what constitutes actual possession, followed and approved. *Lechler v. Chapin*, 65.

2. WHAT CONSTITUTES ACTUAL POSSESSION OF LAND.—Actual possession of land consists in subjecting it to the will and dominion of the occupant, and must be evidenced by those things which are essential to its beneficial use. The law requires that the extent of the claim should be clearly defined, and that the possession should be open, notorious and continuous. *Courtney v. Turner*, 345.

3. IDEM—WHEN AGRICULTURAL LAND NEED NOT BE FENCED.—Where the circumstances of the country are such that the fencing of meadow land is not necessary to its beneficial use, and would be ruinously expensive; where it would be against the interests of the occupants and of the public to require it, and where other means as effectual for the protection of the growing crops are provided for by the occupants of the land: *Held*, that the occupants are not obliged to incur the useless expense of fencing in order to hold their land. *Id.*

4. IDEM—MARKING OF BOUNDARIES AND EXTENT OF CLAIM.—It is a question of fact whether, in any given case, the limits of a claim are sufficiently defined to advertise the public of its extent. *Id.*

5. IDEM.—Where land has been reclaimed from its natural and unproductive state; been drained, leveled, irrigated, and continuously occupied and cultivated for a period of eleven years: *Held*, that any stranger would know (and the defendant, having entered upon the land by the permission of the owner, did know), that all the meadow land in controversy was occupied and claimed before defendants entered upon it. *Id.*

ACTUAL OCCUPANTS OF TOWN SITES ONLY ENTITLED TO DEEDS. (See Town Site, 5.) 65.

ABANDONMENT OF POSSESSORY TITLE. (See Abandonment, 1.) 66.

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RIGHT TO EXAMINE OTHER WITNESSES AFTER CLOSING THE CASE. (See Evidence, 10.) 423.

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REDEMPTION.

WHEN DECREE IS NOT FINAL. (See Appeal, 2.) 20.

REFEREE.

1. REFEREE - FAILURE TO MAKE A REPORT.—If a referee fails to make his report within the time ordered by the court at the time of his appointment, he may be removed upon the application of either party, but if not removed, his authority to hear the case does not expire. *Rhodes v. Williams*, 21.

2. **POWER OF COURT TO REVOKE ORDER OF CONTINUANCE AND APPOINT A REFEREE.**—The court, after continuing the cause for the term, vacated the order of continuance, and referred the cause to a referee: *Held*, that this action of the court was not erroneous. *Young v. Clute*, 31.
3. **IDEM—POWER OF A REFEREE.**—The referee, after the order of reference is made, has the same power to continue the hearing, from time to time, as the court would have had if the case had been tried before it without a jury. *Id.*

REPLEVIN.

1. **PRIMARY OBJECT OF THE ACTION OF REPLEVIN.**—The recovery of damages in a proper case is as much a primary object of the action of replevin as is the recovery of the property in specie. *Buckley v. Buckley*, 423.
2. **REPLEVIN TO RECOVER BAND OF SHEEP—RIGHT TO RECOVER THEIR INCREASE AND WOOL.**—In an action brought to recover a band of ewe sheep or their value: *Held*, that their increase and the wool subsequently shorn from the band are proper subjects of litigation in the same action. *Id.*
3. **IDEM—INCREASE OF LAMBS.**—The rights of the parties relative to the increase are precisely the same as their rights to the original band. *Id.*
4. **IDEM—WOOL SHORN FROM THE SHEEP.**—As to the wool, the remedy is judgment in damages for taking and withholding the sheep, or for the value of their use. *Id.*
5. **IDEM—INDEMNITY IN CASE OF RETURN.**—The party recovering in the action is entitled to a judgment for the return of the band of sheep and the increase, if a return could be had, together with such damages as are necessary, if any, with the return, to indemnify him for all certain actual losses sustained on account of the unlawful taking and withholding, or for the value of the use of the sheep. *Id.*
6. **IDEM—INDEMNITY IN CASE RETURN CANNOT BE HAD.**—If a return cannot be had, the party recovering is entitled to judgment for the value of such portions of the original band and increase, as the other party was bound to return or pay for, together with such damages as are necessary with the value to indemnify him for all certain actual losses sustained. *Id.*

WHEN SUPPLEMENTAL PLEADINGS IN REPLEVIN SHOULD BE ALLOWED. (See Pleadings, 7.) 423.

ROADS.

PETITION TO CLOSE HIGHWAY, WHAT MUST CONTAIN. (See Jurisdiction, 1.) 17.

SALE.

1. **SALE OF PARTNERSHIP PROPERTY.**—The court in ordering a sale of partnership property, has the power to prescribe the time and manner of making the sale, and, if the mode prescribed is reasonable and just, it is immaterial whether the order strictly conforms to the provisions of the practice act regulating sales under execution. *Rhodes v. Williams*, 21.

REPRESENTATIONS WHEN FRAUDULENT. (See Fraudulent Representations, 1, 2, 3, 4.) 151.

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STATEMENT.

- 1. STATEMENT ON MOTION FOR NEW TRIAL—INSUFFICIENCY OF EVIDENCE.**—
An assignment of error upon the ground of insufficiency of evidence to justify the findings and judgment will be disregarded, unless it specifies the particulars in which such evidence is alleged to be insufficient. *Shaw v. Elder*, 78.

STATUTES.

- 1. UNCONSTITUTIONAL STATUTE.**—When any part of a statute is declared unconstitutional, such part is to be regarded as having never, at any time, been possessed of any legal force. *State v. Crozier*, 300.

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STATUTE OF FRAUDS.

1. STATUTE OF FRAUDS—PROMISSORY NOTE—HINDERING, DELAYING AND DEFRAUDING CREDITORS.—In a suit, brought against the administrator of a deceased person, to recover the amount due upon a promissory note, the defendant should be allowed to allege and prove that the note was

made and delivered to plaintiff without consideration, for the sole purpose of protecting the property of the deceased from his creditors, and that it was agreed between plaintiff and said deceased at the time of the execution of said note that it should be canceled whenever so desired. *McCausland v. Ralston*, 195.

2. **STATUTE OF FRAUDS—DELIVERY AND ACTUAL CHANGE OF POSSESSION**—The principles decided in *Gray v. Sullivan* (10 Nev. 416), and *Twist v. Kelley* (11 Nev. 382), as to what acts are necessary to constitute an actual change of possession adhered to upon the doctrine of *stare decisis*. *Estate v. Cooke*, 276.
3. **PAROL LICENSE—STATUTE OF FRAUDS**—The expenditure of money in consequence of a parol license, has the effect of turning such license into an agreement that will be enforced in equity. The execution of the parol license supplies the place of a writing, and takes the case out of the statute of frauds. *Lee v. McLeod*, 280.
4. **STATUTE OF FRAUDS—PAROL AGREEMENT—PART PERFORMANCE**—The statute of frauds is intended for the protection of the respective parties to a parol agreement. Whenever one party, confiding in the integrity and good faith of another, proceeds so far in the execution of a parol contract that he can have no adequate remedy unless the whole contract is specifically enforced, then equity requires such relief to be granted. *Evans v. Lee*, 393.
5. **IDEM**—Nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed. *Id.*
6. **IDEM**—To entitle a party to take the case out of the statute of frauds, upon the ground of part performance of a parol contract, it is essential that the terms of the contract should be clearly and definitely established. *Id.*
7. **IDEM**—Before the contract can be enforced it must be shown that the party seeking its enforcement has performed, or offered to perform, or been ready and willing to perform, all the essentials of the agreement on his part. *Id.*

STATUTE OF LIMITATIONS.

See **LIMITATIONS**.

SURETIES.

1. **LIABILITY OF SURETIES**—The sureties upon an undertaking for the release of an attachment are only bound to the extent of their obligation; they have the right to stand upon the very terms of their contract, and if it has been changed without their knowledge or consent, they are released from all liability. *Quillen v. Arnold*, 234.

LIABILITY OF SURETIES ON AN UNDERTAKING ON RELEASE OF ATTACHMENT.
(See **Pleadings**, 5.) 234.

TAXES.

1. **BOARD OF EQUALIZATION—COMPLAINT AGAINST ASSESSMENT FOR TAXES, HOW MADE**—A complaint made by any person to the board of equalization orally or in writing, that an assessment is too high or too low, and asking that it be reduced or raised is sufficient to authorize the board to act. *State v. Northern Belle M. & M. Co.*, 89.

2. **IDEM—NOTICE TO BE GIVEN.**—If the complaint is of undervaluation, the board must give reasonable notice to the party assessed when it will act upon the complaint. *Id.*
3. **POWER OF STATE TAXATION.**—The power to tax all the property and business within the state is an essential attribute of its sovereignty; there is no restraint upon its exercise, when within constitutional limits, except the responsibility of the members of the legislature to their constituents. *Ex parte Robinson*, 263.
4. **STATE INTERESTED IN COLLECTION OF TAXES.**—The state is interested in having the delinquent taxes due the respective counties collected, whether any portion thereof belongs to the state or not. *State ex rel. Drake v. Hobart*, 108.
5. **IDEM—DUTY OF DISTRICT ATTORNEY.**—The duty of bringing suits for the collection of delinquent taxes is specially imposed upon the district attorney. *Id.*
6. **IDEM—DUTY OF STATE CONTROLLER.**—It is the duty of the state controller to allow the district attorney to inspect and make copies of, or abstracts, or computations therefrom, of all books, papers, statements and accounts, on file or of record in his office relating to the proceeds of mines. *Id.*

TAXES OF COPARTNERS SHOULD BE PAID OUT OF PARTNERSHIP FUNDS. (See Partnership, 3.) 31.

ASSESSOR'S STATEMENT WHEN TO BE TAKEN AS EVIDENCE OF VALUATION. (See Assessor, 1.) 89.

SECTION 1, ARTICLE 10, OF THE CONSTITUTION, CONSTRUED. (See Constitution, 2.) 263.

TENANTS IN COMMON.

1. **TENANTS IN COMMON—PAYMENT OF PURCHASE MONEY.**—Where one tenant in common purchases an outstanding title for the benefit of his co-tenants, the latter must within a reasonable time contribute, or offer to contribute, their proportion of the purchase-money; but this principle does not apply when the purchaser does not desire to be paid, and conveys to his co-tenants the idea that they need not pay until convenient. *Boskowitz v. Davis*, 446.

PURCHASE OF OUTSTANDING TITLE—WHEN A RESULTING TRUST. (See Trust, 6.) 446.

TENDER.

TENDER OF COSTS. (See Costs, 1.) 196.

WHEN TENDER OF EXPENSES NEED NOT BE MADE. (See Trusts, 8.) 446.

TERM.

JURISDICTION OF COURT AFTER EXPIRATION OF TERM. (See Jurisdiction, 1.) 118.

TOWN SITE.

1. **TOWN SITE ACT CONSTRUED—ACT OF CONGRESS.**—The act of congress was intended for the benefit and protection of the actual citizens of the town against those making claim to the land for purely speculative purposes. *Lechler v. Chapin*, 65.

2. **IDEM—PARAMOUNT LAW.**—The act of congress is the paramount law, and the legislature of this state cannot limit or extend the rights of claimants, or dispose of the trust in any other manner than is prescribed by the act of congress.
3. **IDEM—WHEN PROOFS SHOULD BE MADE.**—There is nothing in the act of congress which limits the proof upon the part of claimants to their interest in the land at the time of entry thereof in the land-office. If the land at that time is vacant, it is subject to location and occupancy by any person at any time prior to the issuance of a patent. *Id.*
4. **IDEM—UNOCCUPIED LANDS.**—It was not the intention of congress, nor of the legislature of this state, that the unoccupied lands within the town site at the time of the entry should become the property of the citizens of the town. *Id.*
5. **IDEM—ACTUAL OCCUPANTS ONLY ENTITLED TO DEED.**—To entitle an applicant to a deed, he must be an actual occupant, or entitled to the occupancy of the land. *Id.*

TRESPASS.

- INJUNCTION IN ACTION OF TRESPASS.** (See Injunction, 1, 2, 3, 4.) 251.
- CONTINUING TRESPASS, REMEDY AT LAW.** (See Injunction, 4.) 251.
- POSSESSION OF LAND UNDER PAROL CONTRACT.** (See Ejectment, 1.) 393.

TRIAL.

- ISSUES OF FACT MUST BE TRIED BY A JURY.** (See Jury, 1, 2, 3.) 108.
- EQUITABLE ISSUES, HOW TRIED.** (See Equity, 3.) 108.

TRUSTS AND TRUSTEES.

1. **AUTHORITY OF TRUSTEES TO SELL PROPERTY.**—In construing an agreement, executed by an insolvent debtor and his creditors, appointing trustees to manage his property for the mutual benefit of all his creditors; the creditors agreeing to take a certain percentage of their demands; and if the percentage is paid, that the property shall be returned to the debtor; "otherwise, said property to be sold for the benefit of all parties creditors hereto, and divided *pro rata* between said creditors:" *Held*, that the authority to sell the property was clearly given to the trustees. *Luigi v. Luchesi*, 306.
2. **IDEM—LIABILITY OF TRUSTEES.**—Where it is admitted that a sale of property by the trustees of the creditors of an insolvent debtor is honestly made and fairly conducted, and there is no evidence tending to show that the property was sold for any less than its full value, the trustees can only be held for what they actually received. *Id.*
3. **TRUST—WHEN MAY BE PROVED BY PAROL.**—A trust concerning lands created by act or operation of law may be proven by parol. *Boskowitz v. Davis*, 446.
4. **RESULTING TRUSTS—PURCHASE OF LAND.**—If land is purchased in the name of one person and the consideration paid by another, at the time the title is acquired, there is a resulting trust in favor of the latter. *Id.*
5. **IDEM—WHEN MONEY MUST BE PAID.**—In order to establish a resulting trust for the payment of the purchase money, it must be shown that it was paid at the time the title passed. *Id.*

6. IDEM—TENANTS IN COMMON—PURCHASE OF OUTSTANDING TITLE.—Where the possessory title to land is purchased by five tenants in common, and afterward one of the co-tenants purchased the title in fee, and it was sought by four of the co-tenants to exclude Rowland, the other co-tenant, who owned one-sixth of the possessory title, from the proceeds derived from the sale of the lands: *Held*, that the law raised a resulting trust in favor of Rowland to the extent of a one-sixth interest, independent of the intention of the parties, and forced it upon the consciences of his associates by operation of law. *Id.*
7. IDEM—PAYMENT OF EXPENSES.—A trustee should be allowed all proper expenses incurred in the discharge of his duties; and a tenant in common who acquires an outstanding title beneficial to his co-tenant should be fully recompensed before a court requires him to convey to his co-tenant. *Id.*
8. WHEN TENDER OF EXPENSES NEED NOT BE MADE.—If, at the time of the commencement of an action to recover the proceeds of the sale of the trust property, there is more trust money in the hands of the defendants than is sufficient to pay all the expenditures, there is in such a case no reason for the rule requiring the *cestui que trust* to tender his portion of the expenses. *Id.*
9. NAKED TRUSTEES AND PURCHASERS OF AN EQUITABLE INTEREST ARE NOT ENTITLED TO NOTICE.—The defense of being a purchaser for value without notice does not apply to a mere naked trustee, who holds the title for the parties beneficially interested; nor to any person claiming an equitable interest in the lands. *Id.*

AGREEMENT TO EXTEND TIME FOR PAYMENT OF NOTES. (See Agreement, 1.) 355.

WITNESS.

1. CROSS-EXAMINATION—WHEN ERROR.—The cross-examination of witnesses ought to be allowed a free range within the subject-matter of the evidence in chief, but if it ranges outside of that it is error. *Buckley v. Buckley*, 423.

QUESTIONS ASKED WITNESS TO REFRESH HIS MEMORY. (See Evidence, 1.) 83.

TESTIMONY OF DECEASED WITNESS, WHEN ADMISSIBLE. (See Evidence, 4.) 121.

OPINIONS OF WITNESSES—WHEN NOT ADMISSIBLE. (See Criminal Law, 4.) 125.

TESTIMONY OF DEFENDANT'S BELIEF AT TIME OF HOMICIDE ADMISSIBLE. (See Criminal Law, 5.) 126.

REFRESHING MEMORY OF WITNESS. (See Evidence, 6.) 196.



